USA TODAY

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High court's zigzag term defies political labels

By Tony Mauro
USA TODAY

Chief Justice William Rehnquist sounded envious recently when he told of a foreign counterpart who could bring his unruly colleagues to order by simply tapping his pencil.

In the term that ended Monday, the justices showed once again that neither Rehnquist, nor any other justice, can bring any overarching order to the court.

Rehnquist, a solid conservative, ended his 10th term presiding over a court that defies description as either liberal or conservative.

The court showed its conservative stripes most often on issues of criminal law, usually siding with law enforcement and narrowing protections for defendants; on First Amendment issues, it usually took liberal stands, striking down government restrictions on freedom of speech; on civil rights, it sent mixed messages.

Generally viewed as conservative justices besides Rehnquist: Antonin Scalia and Clarence Thomas. Liberal or moderate: John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer. Swing votes: Sandra Day O'Connor and Anthony Kennedy.

The court made a number of key rulings this term.

▶ **Single-sex education:** By a 7-1 vote, the court ruled June 26 that Virginia's alternative program for women did not make the all-male status of Virginia Military Institute constitutional. The court's ruling means VMI will have to admit women or go private.

▶ **Gay rights:** Colorado's Amendment 2, aimed at keeping localities from enacting measures to protect gay rights, violated the Constitution, the court said May 20. The 6-3 ruling said the amendment put a class of citizens at an unfair disadvantage.

▶ **Voting rights:** In a pair of rulings June 13, the court said bizarrely shaped voting districts in North Carolina and Texas that contain mainly minority voters could not withstand constitutional scrutiny because race was the "predominant" factor in their design. The decision came in separate 5-4 and 6-3 votes.

▶ **Death penalty:** The new federal law that restricts the ability of death-row inmates to file repetitive appeals is constitutional, the court ruled June 28. The unanimous decision held that direct appeals to the Supreme Court are still available.

▶ **Punitive damages:** Some high punitive damage awards are "grossly excessive" and unconstitutional, the court ruled May 20. The 5-4 ruling struck down a $4 million verdict against BMW won by an Alabama doctor whose car was repainted before it was sold as new.

▶ **Cable indecency:** Several provisions of a federal law restricting indecent programming on public access cable television channels were struck down June 28 in a fractured 5-4 ruling.

▶ **Forfeiture:** The law enforcement strategy of prosecuting drug dealers under criminal law and also seizing their assets is constitutional, the court said June 24. The 8-1 ruling said the strategy does not violate the Fifth Amendment prohibition against being punished twice for the same crime.

▶ **Police searches:** Police may use minor traffic violations as a reason to stop a car and then conduct a more complete search even if they have no warrant, the court said in a unanimous June 10 ruling.

Internet case on fast track

The Justice Department appealed to the U.S. Supreme Court Monday to lift an injunction blocking the Communications Decency Act.

Three federal judges issued the injunction June 12, saying that the law, designed to punish the display of offensive material on the Internet, violates constitutional freedoms of speech.

The government used a fast-track clause in the act to file its appeal directly to the high court. It did not say what the grounds for appeal were, and calls were not returned.

The Associated Press

The Washington Post

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Consideration, Not Quotas

ON THE final day of its current term, the U.S. Supreme Court refused to hear an appeal in a case from Texas, whose resolution had been eagerly awaited by colleges and universities and those interested in civil rights issues across the country. The case was brought by four white applicants to the University of Texas Law School; they charged that the university's affirmative action policies had violated their rights. In an effort to promote racial diversity at the school, the university had set up parallel lists of applicants with whites having more difficult standards to meet than certain minorities. The goal of the plan was to create a student body in which 10 percent of the students would be Mexican American and 5 percent, African American.

This rigid quota system was struck down by the district court. The U.S. Court of Appeals for the 5th Circuit affirmed, but went further, casting doubt not only on similar schemes but on any admissions policy where race was one of a number of factors considered. Since a 1978 Supreme Court decision in *Bakke v. University of California*, most universities have abandoned quotas but taken race into account when judging among applicants. But the Texas ruling purports to set aside that precedent, rejecting diversity as grounds for policies that include race as one characteristic to be considered.

The Supreme Court very seldom publishes its reasons for declining an appeal. But on Monday Justices Ginsburg and Souter provided a comment indicating that the case was not accepted because its central question is now moot—Texas abandoned its double standard system in 1994—and its position on *Bakke* merely advisory. So both sides, those who oppose all affirmative action and hoped the Texas ruling would be upheld, and those who sought a reversal strongly reaffirming *Bakke*, were disappointed. Instead, Justice Ginsburg wrote, the court "must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."

Meanwhile the 5th Circuit decision—which is binding only in Texas, Louisiana and Mississippi—does offer something of a loophole for schools that seek diversity. The opinion suggests that social and economic factors, among others, can be taken into account in admitting students. And in practice, that will probably lead to the enrolling of more minorities.

The Supreme Court surely will have occasion to reconsider *Bakke* soon. We believe it should be reaffirmed, as it offers a flexible and effective means of decreasing racial segregation without unconstitutionally discriminating against whites and other nonpreferred minorities because of their race. This country will be better, stronger and more unified if youngsters of every racial, social and economic background have an opportunity for higher education. Reaching out to those who need encouragement does not need to involve quotas.

STRICT SCRUTINY

BY DAVID COLE

Legal Times 1-23-95

'Hoop Dreams' and Colorblindness

Seventeen years ago, as the Supreme Court gathered in conference to decide *Regents of the University of California v. Bakke* (1978), its first decision on affirmative action, Justice John Paul Stevens optimistically suggested that racial preferences might soon become unnecessary. Justice Thurgood Marshall, never one to mince words, replied that affirmative action would be necessary for another 100 years if the wrongs that had been inflicted on African-Americans were to be remedied.

Two weeks ago, as the Supreme Court heard argument in *Missouri v. Jenkins*, the latest in a line of cases concerning the scope of school desegregation remedies, Justice Antonin Scalia voiced a starkly different view of race discrimination and its redress. Scalia maintained that the only students who suffer from the "vestiges of past discrimination" are those who were actually in school when de jure segregation was in effect. Once those students graduate, no victims remain. He dismissed Justice David Souter's suggestion that the vestiges of segregation might be passed on from generation to generation.

Last week, Scalia made an even more remarkable comment during oral argument in *Adarand Constructors Inc. v. Peña*, a challenge to a federal contracting program that favors disadvantaged enterprises and includes a rebuttable presumption that minority- and women-owned small businesses are socially disadvantaged. Scalia asked the solicitor general why it would be any different for the National Aeronautics and Space Administration to use a rebuttable presumption that white people are more competent than minorities in hiring for a very sensitive and important job.

Scalia, of course, knew what the answer would be—the former considers race only to remedy discrimination, while the latter uses race to perpetuate subordination and inequality. But Scalia's none-too-subtle point was that, in his view, there is no difference. In a "colorblind" world, all consideration of race is evil.

Race discrimination law today is much closer to Justice Scalia's point of view than to Justice Marshall's. And it may move even closer to that end of the spectrum in *Jenkins* and *Adarand Constructors*, argued ironically like bookends around the Martin Luther King holiday. In both cases, conservatives have urged the Court to adopt Scalia's view virtually wholesale.

As the law moves in Scalia's direction, however, the real world increasingly confirms Marshall's dire prediction. The justices need only to look out their windows to see that the vestiges of discrimination continue to cripple children born into the black community. Inadequate schools, intolerable housing, rampant unemployment, drugs, and violent crime make it more likely that a black male born in the District of Columbia today will go to jail than to college, if he even lives that long.

From January to October of 1994, there were 317 murders in the District of Columbia; 10 of the victims were white. The District's population is slightly more than 30-percent white, yet its public high schools have 14,000 black and 348 white students, and more than half its elementary schools do not have a single white student.

Nor is the District unique. Justice Scalia would do well to see the documentary "Hoop Dreams," which portrays the lives of two black high-school basketball stars growing up in Chicago. The film leaves one with a painful sense of the overwhelming odds against making it that children growing up in the inner city face, in any endeavor. Raised in abject poverty, the film's subjects struggle for a route out through basketball against one-in-a-million odds—and that long shot may still be a better chance than their less talented friends have.

Yet from Scalia's legal perspective, all of the above is mere "societal discrimination," which translates into discrimination that courts have no power to remedy. It is not fair, Scalia insists, to impose on a school district the obligation to remedy discrimination not of its own making. As a result, the more broadly discrimination is spread, the less subject any particular element of it is to redress.

Missouri v. Jenkins is a case in point. The lower courts found that Missouri's discriminatory practices had resulted in substandard achievement by black students in the Kansas City schools, and held that, therefore, student test scores were one factor to consider in determining whether vestiges of segregation have been eliminated. Missouri argues that student achievement is wholly irrelevant; at oral argument, Missouri's lawyer went so far as to maintain that if segregation had caused children to be unable to read, whether they could read after the remedy had been in place would be irrelevant.

Lamberto Alvarez

Missouri's claim that it is unfair to ask whether remedial steps have affected schoolchildren's achievement rests on one of two premises. The stated premise is that poor black achievement is due to factors beyond the state's control, namely, "societal discrimination." The unstated, more insidious premise recalls Richard J. Herrnstein and Charles Murray's *The Bell Curve*, which argues that black students are genetically inferior in intelligence. In any event, Missouri claims, it is futile to ask whether any kind of substantive equality has been achieved, and therefore the courts should simply avoid the question.

Whether or not the Court accepts Missouri's argument in full, it appears to be moving toward Missouri's viewpoint. Forty-one years after *Brown v. Board of Education* (1954), the Court's most insistent question in school-desegregation cases these days is, "When is enough enough?" As the NAACP Legal Defense and Educational Fund's Ted Shaw had to remind Justice Anthony Kennedy at the *Jenkins* oral argument, the objective is not simply to return control of the schools to elected officials, but to *remedy the violation* and only then return to local control. The Court seems less interested in providing a remedy than in extricating itself from the problem.

Ordinarily, when conservative jurists express such concerns about the limits of judicial relief, they maintain that relief should more properly come from the political branches. But in race matters, conservatives seem unwilling even to allow the political branches to undertake a remedy. In the second racial-justice case argued this term, the Supreme Court will decide whether even the duly elected Congress has the power to address inequality in the construction industry, which has long excluded minorities and women.

The affirmative action program under attack in *Adarand Constructors* provides about the most minimal race-based advantage one could imagine. It creates no set-asides and no quotas. No business is denied or guaranteed any contracts because of race. The program merely seeks to encourage prime contractors to subcontract with socially and economically disadvantaged subcontractors by providing compensation for the extra costs associated with doing business with such entities. The only race-based aspect of the program is a presumption, rebuttable by anyone, that minority- and women-owned businesses are disadvantaged.

In challenging this program, conservatives have urged the Supreme Court to repudiate longstanding precedent that Congress' enforcement powers under the 13th and 14th Amendments allow it to identify and remedy discrimination that the Court itself might not recognize as discrimination. Yet precisely because the Court finds itself institutionally incapable of addressing broad problems like societal discrimination, it is critical that it permit Congress (and for that matter, other legislatures) to do so.

More broadly, the very persistence of stark racial inequality suggests that the Court and the political branches need to consider forward-looking rather than backward-looking justifications for affirmative action. As de jure segregation fades into the past, and de facto inequality continues to define our future, we need to stop looking back and instead to look outside our doors and windows to the city streets. The mere existence of such racial inequality, irrespective of its cause, ought to be reason enough for race-conscious remedies.

If the Court rules the way conservatives have asked it to in *Jenkins* and *Adarand Constructors*, racial inequality may well become a problem beyond redress—not because it is inherently intractable, but because the Supreme Court will neither take responsibility for providing relief nor allow the political branches to do so. We seem to be headed in that direction. If that is what the Court intends, then the "colorblind society" it has so often invoked will be not a place of equal opportunity for all, but a society "blindered" to its deep stratification along racial lines. For the sake of the children in "Hoop Dreams" and throughout the nation's cities, I hope that is not what the Court means.

David Cole is a professor at Georgetown University Law Center, where he teaches constitutional law, and a volunteer staff attorney for the Center for Constitutional Rights in New York City. "Strict Scrutiny" appears monthly in Legal Times.

LEGAL TIMES

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Edley: 'Not Back to Square One'

Months before the Supreme Court issued its forceful opinion on June 12 in Adarand Constructors Inc. v. Peña, *Christopher Edley Jr. had been training an eye on federal affirmative action programs.*

Edley, an Office of Management and Budget associate director and longtime Harvard law professor, was designated in March to head President Bill Clinton's review of the programs, which number roughly 160. Both foes and proponents of legal remedies for racial minorities and women have been anxiously awaiting the administration's conclusions.

Adarand *has only made the issue even more charged. The Court voted 5-4 that federal affirmative action programs based on race must pass a "strict scrutiny" test when challenged on constitutional grounds—posing a high hurdle for the government to scale.*

But many questions remain: What happens to federal programs aimed at women? How has the high court's ruling changed the political equation?

Affirmative Action

Edley addressed those questions and spoke out about an aggressive plan by Rep. Charles Canady (R-Fla.) to scale back federal affirmative action in an interview June 16 with Court TV anchor Fred Graham on "Washington Watch," a weekly program produced in association with Legal Times.

Fred Graham: Some people are saying that, in fact, this issue helps the president, gives him political cover. He's probably going to trim back some affirmative action programs anyway. He can tell his supporters who don't want that to happen, "I gotta do it—the Supreme Court says I have to do it. [Affirmative action] is unconstitutional."

Christopher Edley Jr.: We really haven't spent a lot of time doing political analysis because the politics argues on every side of this issue. When we talk about trying to think about this issue and reason about this issue in a national conversation that's above politics, we're serious. When the president spoke about his sense of the implications of *Adarand*, we didn't try to put a political spin on it. We told it like we see it—which is that it's a setback but it's not the end of the world.

Graham: But certainly this will affect [Clinton's] calculus here because he doesn't want to come forward when he takes his position and say, "I want to continue with certain programs" if, indeed, your constitutional analysis tells him they're probably unconstitutional.

Edley: That's true. But interestingly, as the statement that the president made on [June 13] pointed out, we've actually been asking many of the same questions as a policy matter that the Supreme Court is now saying are required to be asked as a matter of constitutional law. In that sense, it's not back to square one by any means.

Graham: How is the decision likely to affect the president's timing in terms of coming out with his proposal?

Edley: Frankly, that's something that we're still looking at. And, in part, we're looking at it not because we'd have to go back to the drawing board in terms of policy questions, but the evidentiary burden that's required to make a policy judgment is different from the kind of evidence one would have to assemble to give to a district court judge looking at these programs.

Graham: It's interesting the reactions that have come to this decision by the Supreme Court. It's a little murky, but apparently people who are hostile to affirmative action said, "Oh boy, this is really going to clean house." But people who don't want it to change much say this isn't going to do much. What's your analysis?

Edley: It's somewhere in between. Before the ink was even dry, you had people on both sides of the debate making exaggerated claims about what the decision did or didn't mean. I think the straight reading of it is the following: It raises the hurdle but the hurdle is not insurmountable. It asks some hard questions, but both as a policy matter and as a matter of fairness they're the right questions to be asked. The difficulty is going to be that now—because the Supreme Court is weighing in, saying that federal judges will be making decisions about fairness—a lot of this is going to be handled in the courts when it would, and probably should, be handled by the elected representatives in the executive and the legislature.

Graham: Is there a problem here in the practical sense because the decision applies only to racial preferences?

Edley: There is a practical problem. . . . I believe it was Justice Stevens who pointed out that there is an anomaly with regard to women, and of course many affirmative action programs are concerned with discrimination against and inclusion of underrepresented women. The Supreme Court has used not strict scrutiny but Gender-based programs could stay in; racial ones might be struck down.

Edley: It's clearly an anomaly and I think it just goes to the heart of the problem with the logic of the majority's approach. I don't think it's a stable solution. Something's got to give. But I do want to correct one thing. It would be incorrect to think this decision is a death knell for affirmative action. I'm confident there will be a great many programs that will survive strict scrutiny under the *Adarand* test and will be able to jump over that hurdle. It's a tough homework assignment, but we can do it.

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Los Angeles Times

DATE: 7·20·95

PAGE: A4

GOP in Bitter Disarray Over Bias Programs

■ **Politics:** Democrats seem to have reached a general accord. Republicans, on the contrary, find themselves deeply divided on issue.

By SAM FULWOOD III
TIMES STAFF WRITER

WASHINGTON—While Democrats appear to have reached some level of agreement on how to proceed on affirmative action, the Republicans are in disarray, acrimoniously arguing among themselves over how forcefully to oppose race-based federal policies.

Republican congressional leaders' reluctance to introduce legislation attacking affirmative action programs is attributed by many to concern that steps to end such programs would make them appear racist and sexist. The specter of 1996 presidential politics also hovers over the debate.

In a sign that many party faithful see as a retreat, House Speaker Newt Gingrich (R-Ga.) has urged his colleagues—including Senate Majority Leader Bob Dole (R-Kan.), who is campaigning for his party's presidential nomination on an anti-affirmative action platform—to delay introducing promised legislation until later this year. His critics accuse Gingrich of backing away from a politically sensitive issue but his aides say that he wants to craft legislation carefully and thoughtfully.

"We are a few months away from moving our affirmative action agenda," said Tony Blankley, Gingrich's chief spokesman. "We have conveyed our thoughts all around the party that it would be best to think through our policy and how best to communicate what that policy is."

But that go-slow approach has angered some party activists who fear that the GOP is worrying too much about politics and too little about keeping faith with its anti-affirmative action rhetoric.

"I think that decision is symptomatic of a certain level of discomfort with the issue on the part of Republicans," said Abigail Thurnstrom, a political science professor at Boston University who closely watches Republican congressional leaders. "This is not a subject—race—that they feel comfortable dealing with. It is not where they live."

Thurnstrom said that Republican leaders are sensitive to charges of racism and sexism, making them cautious in their efforts to balance their anti-affirmative action legislation with policies that would provide opportunity for minorities and women without promoting group preferences.

"The message [anti-affirmative action leaders] are sending to the black and Latino communities is that we're going to take something from you," Thurnstrom said. "It is extremely important for the Republicans to say what they are going to do in place of affirmative action. That's certainly the way Gingrich is thinking."

But some party stalwarts, such as Linda Chavez, a conservative anti-affirmative action activist who chaired the U.S. Commission on Civil Rights in the Ronald Reagan Administration, said that such talk is political doublespeak. "They're a bunch of nervous nellies up there who have never been comfortable talking about race and hope that it goes away," Chavez said. "They are basically getting cold feet."

Chavez, who has argued for years against federal set-aside and affirmative action programs that benefit women and minorities, said that she is angry with her party's leaders because they are "acting like Bill Clinton . . . by wanting to be on both sides of the affirmative action debate and wanting to avoid making anyone mad.

"Republicans want to sound like they're dismantling preference programs, but so far they aren't doing very much. That's pulling a Clinton."

But Blankley disputed that view, arguing that the Republican Party has "an opportunity" to gain support among African American and Latino voters by making sure it has something to say about what it supports instead of only arguing against affirmative action.

"If we don't express our full view on affirmative action, including the positive aspects of our policies, then we will miss out on this opportunity to reach the broader public," Blankley said. "When we have our full program together, then all Republicans will have a better chance to get out before the country and deliver a more coordinated message of what we're opposed to and what we are for."

Gingrich, in fact, often rails against "preferences based on genetic codes" and promises sweeping legislation that would abolish affirmative action programs altogether.

Both Dole and Sen. Phil Gramm (R-Tex.), another GOP presidential hopeful, have spoken out against affirmative action but neither has introduced legislation nor given specific details of what they would do.

Last March, Dole announced that he would submit a bill which would ban racial and gender preferences in hiring, promoting and business contracting with the federal government, said Joyce Campbell of the majority leader's office. She said that Dole remains opposed to government programs that give preferences to people based on race and gender and plans to introduce his bill next week.

Immediately after Clinton's speech in support of affirmative action, Dole criticized the President on the Senate floor Wednesday but did not say when his legislation will be submitted.

Rep. Charles T. Canady (R-Fla.), who chairs a House subcommittee on the Constitution, said that he is working with both Gingrich and Dole on proposed legislation but said that he could not promise when exactly the bill will be submitted.

"We Republicans are not unanimous on this," he said. "I understand that sometimes things don't move as fast in Congress as some people like but we are working on this and we will have the bill soon."

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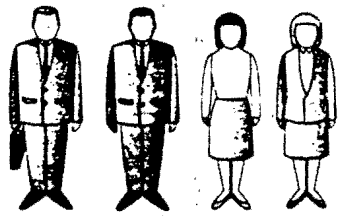
Orders From the White House

Highlights of White House action Wednesday on federal affirmative action programs.

CLINTON'S ORDERS

President Clinton told heads of federal departments and agencies that any affirmative action program must be eliminated or reformed if it:



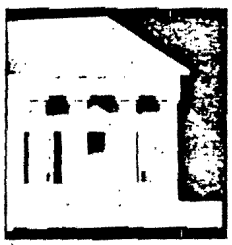
- Creates a quota
- Creates reverse discrimination
- Creates preferences for unqualified individuals
- Continues even after its equal opportunity purposes have been achieved

THE SET-ASIDE PROGRAM

Vice President Al Gore is to lead a Community Empowerment Board that will develop a set-aside program targeting federal contracts to small companies, regardless of their owners' sex or race, that locate in poor communities. "Looking beyond the issue of fair and effective responses to discrimination, we must recognize that there are communities and regions in our country where the free enterprise system is not working to provide jobs and opportunity," the President's affirmative action report said.

Gore's new mission: jobs for poor communities

THE SUPREME COURT GUIDELINES



The high court set affirmative action standards recently, ruling that:

"All racial classifications " by government agencies are "inherently suspect and presumptively invalid." The court said such programs cannot be broadly applied to remedy suspected discrimination over time, but could be used to correct specific, provable cases of discrimination.

Source: Times staff and wire reports

Los Angeles Times

recent evidence of this" reports of a racist picnic in Tennessee attended by federal agents, including some from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms and the FBI.

The event was a "sickening reminder of how pervasive these kinds of attitudes still are," Clinton said, declaring that he intends to take "appropriate action" in the case.

In conjunction with the speech, Clinton issued a memorandum calling on agencies to review their affirmative action programs to ensure that they are in compliance with the Supreme Court's June ruling that race-conscious government programs must be judged under a standard of "strict scrutiny."

But he argued that the case does not necessarily spell a sharp scaling back of affirmative action, since, he said, state and local government have continued such programs under similar standards.

Clinton also called for a new federal set-aside program to funnel federal contracts to businesses in poor areas, even if they are owned by whites. The "empowerment communities" program, to be developed under the supervision of Vice President Al Gore, would need approval from the Republican-controlled Congress, a fact that appears to diminish its chances of becoming a reality.

Clinton acknowledged the flaws of some affirmative action programs and said that he has directed U.S. officials to root them out. The government needs to crack down, he said, on companies that pretend to be eligible and are not.

He said that criticisms of the evenhandedness or effectiveness of programs have been "fair questions."

Yet while Clinton acknowledged abuses in execution of the programs, he staunchly defended their underlying principles. He insisted that there is no reason that affirmative action should mean the funneling of government benefits to the unqualified.

He twice cited the efforts of his Small Business Administration to increase lending to minorities and women in his Administration. He said the White House review found that the SBA last year increased loans to minorities by two-thirds, loans to women by more than 80% and that it did not decrease loans to white men. Yet, "not a single loan went to an unqualified person."

"Affirmative action has not always been perfect and affirmative action should not go on forever," the President said. "It should be changed now to take care of those things that are wrong and it should be retired when its job is done.

"I am resolved that that day will come," Clinton said. "But the evidence suggests—indeed, screams—that that day has not come."

Clinton praised the most controversial aspect of affirmative action, the set-asides that apportion a share of all contracts for minorities or women. "It has helped a new generation of entrepreneurs to flourish," he said.

Advocates for such programs, beleaguered in recent months, could not contain their delight.

"There was nothing in the speech I would have disagreed with," said A. J. Cooper, an official of the National Assn. of Minority Automobile Dealers.

But some of Clinton's admirers acknowledged that they had not been entirely sure that he would come out so squarely on their side. Some noted that last winter, some White House officials were arguing for Clinton to endorse the California initiative that would end state affirmative action preference programs.

"It was much stronger than I thought it would be, going in," said Eleanor Smeal, president of the Feminist Majority.

Meanwhile, Clinton's allies in the moderate to conservative wing of the party were subdued.

Sen. Joseph I. Lieberman (D-Conn.), chairman of the Democratic Leadership Council, which had tried to push Clinton toward programs based on financial need, did not criticize Clinton. But in comments on the Senate floor, he worried about the unfairness of affirmative action and predicted that its programs would not stand up in the face of the court's decision.

'Colorblind' policy unites GOP hopefuls

The Washington Times

TUESDAY, FEBRUARY 21, 1995

Affirmative action key '96 issue

By Nancy E. Roman
THE WASHINGTON TIMES

Affirmative action is fast becoming a central theme of the 1996 political season — with Republican presidential candidates boldly denouncing race and sex preferences in hiring and firing.

The campaign season could lay the groundwork for the ultimate repeal of laws requiring hiring and promoting based on race and sex.

In the past several weeks, one Republican after another has criticized affirmative action or argued that laws requiring it should be appealed. Each of the top three contenders for the GOP presidential nomination has said that, if elected, he would scale back affirmative-action laws.

The snowballing discussion continued yesterday.

"We ought to live in a colorblind society," Senate Majority Leader Bob Dole said at a town meeting in Manchester, N.H., where nine GOP presidential contenders gathered for a fund-raising dinner.

"It [the job] ought to be based on merit. If you have the merit, you ought to be able to do it. If you don't, you shouldn't," the Kansas Republican told CNN.

Aides to Sen. Phil Gramm, another GOP contender, said yesterday the Texas Republican was standing by his statement Sunday: "If I become president, by executive order I will overturn quotas, preferences and set-asides."

Former Tennessee Gov. Lamar Alexander, also vying for top spot on the Republican presidential ticket, told The Washington Times that reversing affirmative-action laws will be a central to his campaign. He said redefining "equal opportunity" to mean competition without preference based on race or sex could be the "single most powerful grass-roots issue in 1996."

"The closest thing I can think of to the definition of an American is to award scholarships and jobs and other privileges in this country based upon your race or your country of origin," he said. "People come to this country to get away from that."

The review of affirmative action is not exclusively Republican.

Rep. Collin C. Peterson, Minnesota Democrat, belongs to a newly formed coalition of 23 conservative Democrats that also will explore the issue.

"I welcome hearings. We want to get into this," he said. "It's interesting that we can have people raise this issue and have hearings and not be ostracized. Two years ago if anyone would have said this, they would have strung them up."

George Stephanopoulos, senior adviser to President Clinton for policy and strategy, told The Times he expects affirmative action to be an issue in the 1996 election campaign.

"I think there's no question that people will try and use the issue of race in the coming two years as a political tool," he said.

Mr. Dole only two weeks earlier ignited discussion of affirmative action by announcing that he has requested "a comprehensive list of every federal statute, regulation, program and executive order that grants a preference to individuals on the basis of race, sex, national origin or ethnic background."

"Why did 62 percent of white males vote Republican in 1994?" he said on NBC-TV's "Meet the Press." "It's because of things like this, where sometimes the best-qualified person does not get the job because he or she may be one color. And I'm beginning to believe that may not be the way it should be in America."

A citizens group in California, a bellwether state on political and social issues, is collecting signatures for a 1996 referendum that would prohibit hirings and promotions based on race and sex — an initiative sometimes referred to as the "angry white man" law.

At a think-tank seminar on civil rights last month, a consensus of participating House members and pundits said the California initiative will be closely watched. They predicted that politicians will use it as a hook on which to hang their anti-affirmative-action rhetoric.

The hope among Republicans is that, as more politicians discuss race and sex preferences, talk radio will take up the issue, grass-roots groups will mobilize and it will become politically viable to amend federal laws mandating quotas.

Rep. John Boehner, chairman of the House Republican Conference, said this month that both chambers will review affirmative-action laws.

"Government is to ensure that all Americans have a fair opportunity," he said. "We shouldn't be giving anyone special rights, special considerations over the rights of other Americans."

Last month two House committee chairmen said they will hold hearings on the Justice Department's civil rights agenda.

Rep. Henry J. Hyde, Illinois Republican and chairman of the House Judiciary Committee, wants to review the administration's enforcement of civil rights.

Rep. Bill Goodling, Pennsylvania Republican and chairman of the Economic and Educational Opportunities Committee, said hearings by his panel may lead to amending civil rights laws or drafting new legislation so that race-based hiring or firing is no longer permissible. He did not specify a time frame.

Rep. Charles Rangel, the New York Democrat who represents Harlem, said the Republican denunciation of affirmative action is pure political opportunism.

"The vestiges of racism are still here, and it's being exploited," he said on "Meet the Press." Republican attacks on affirmative action are an attempt "to scapegoat minorities, immigrants and poor folks," he said.

see POLICY, page A20

A1 POLICY

From page A1

CIVIL RIGHTS EMPLOYMENT LAWS

As enacted, the equal employment section (Title VII) of the Civil Rights Act of 1964 prohibited persons from refusing to hire a person, discriminating against him in pay or conditions of employment, or segregating him or otherwise depriving him of equal employment opportunities on account of his race, color, religion, sex or national origin. The act also prohibited unions from refusing or limiting union membership, discriminating in apprenticeships, or attempting to make an employer discriminate because of race, religion, sex or national origin.

Coverage was applied in stages beginning with companies of 100 or more employees and working down to companies with 25 employees. State and local governments were not covered.

An Equal Employment Opportunity Commission was set up to work with state and local agencies and to investigate charges of unlawful employment practices. The EEOC was authorized to attempt to resolve such issues through voluntary conciliation but could not enforce its decisions through administrative action. If EEOC conciliation failed, an individual could bring a civil suit and the attorney general was authorized to sue where there was a pattern or practice of discriminatory employment practices.

A provision of the 1968 civil rights law provided federal penalties for injuring or intimidating a person because of his race, religion or national origin and because he was working for a state or local government or private employer or joining or using the services of a labor union.

Sources: "Congress and the Nation" and "Oxford Companion to the Supreme Court"

The Washington Times

CIVIL RIGHTS CATCHWORDS

The origins of the words "quota" and "affirmative action" as used today:

Quota — The number permitted or required in civil rights terminology government-set numerical standards to require admission or employment of blacks on the grounds that this helps to compensate for two centuries of discrimination.

The Latin "quotus" asks, "How many?" In the first half of this century the political use of this word involved immigration. How many should be let in from which nations.

In the civil rights backlash of the 1970s, the word "quota" — like busing — became politically sensitive, as many who had been proponents of civil rights for blacks, in theory, did not like the practice. They believed it abridged civil rights for whites.

When black activists sought a form of reparations for past prejudice, it was attacked as "reverse discrimination."

Affirmative action — As a phrase, it was conceived during the Eisenhower administration. According to Secretary of State George Shultz, it was used in the 1955 White House conference on equal job opportunity.

Its first official use came six weeks into the Kennedy administration, in Executive Order 10925, March 1961. "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated, during employment, without regard to their race, creed, color or national origin."

Source: Safire's New Political Dictionary, by William Safire

The Washington Times

PHOTOCOPY PRESERVATION

[Legal Times
Week of February 6, 1995]

Justice Department Takes Heat For Supporting Fired Teacher

TEACHER FROM PAGE 4

tern, which the U.S. Supreme Court has consistently required for such preferences.

In a subsequent trial before Barry on damages, a year ago, Taxman was awarded $144,000 for lost wages, interest, benefits reimbursements, and pain and suffering.

Although the parties stipulated to the facts about two years ago, a discussion of what happened ran through the second set of arguments in the case, between the school board's counsel, Rubin, and Taxman's attorney, Klausner.

DIVERSITY INQUIRY

Judge Hutchinson agreed with Rubin that a remand was possible, to develop how the board could implement a diverse faculty. Arguing that, under case law, the board's purpose was valid, Rubin moved to the second part of the inquiry directed by case law: whether the methods to be used for diversity were overreaching.

Rubin pointed out that diversity in the classroom was the board's goal, an argument that Judge Barry soundly rejected. But he said that educational authorities look to the students' perspective as a frame of reference. That means examining the facility, courses, and curriculum. Evidence at trial, Rubin said, was only anecdotal, based on the statement of one university professor.

Rubin, who argued first on the merits, said Barry's opinion avoided "forward"-looking programs, and emphasized that affirmative action was supposed to remedy past injustice. He relied on *Regents of the University of California v. Bakke* to claim that the board's faculty-diversity purpose was appropriate.

The case permits race to be used as a "plus" factor in making graduate-school admissions decisions, provided that an appropriate selection method is used.

The board's method in the layoff situation was justified, he said, because it "didn't have a specified number of seats to be set aside for minority members," a fatal flaw in the *Bakke* plan.

When Mansmann asked Rubin how he would write the decision, he said the court should rule that race would be a permissible consideration for a personnel decision—providing that there were equally qualified candidates like Taxman and Williams—when the school system is promoting a racially and culturally balanced faculty.

If that personnel system is designed to exclude individuals, or is a pretext for exclusion, it couldn't be used, according to Rubin.

Klausner, Taxman's attorney, opened his argument by stating that it was impossible to make departmental subunits diverse. Rubin's argument "ignores the entire law of Title VII," he said.

Klausner, in response to a question by Judge McKee about the application of *Bakke*, said that more must be shown to make race a "plus" factor.

McKee responded that diversity is a "compelling state interest, at least in an educational setting." Pointing out the lack of black teachers in the department, McKee added that "white students also are entitled to go into a diversified classroom."

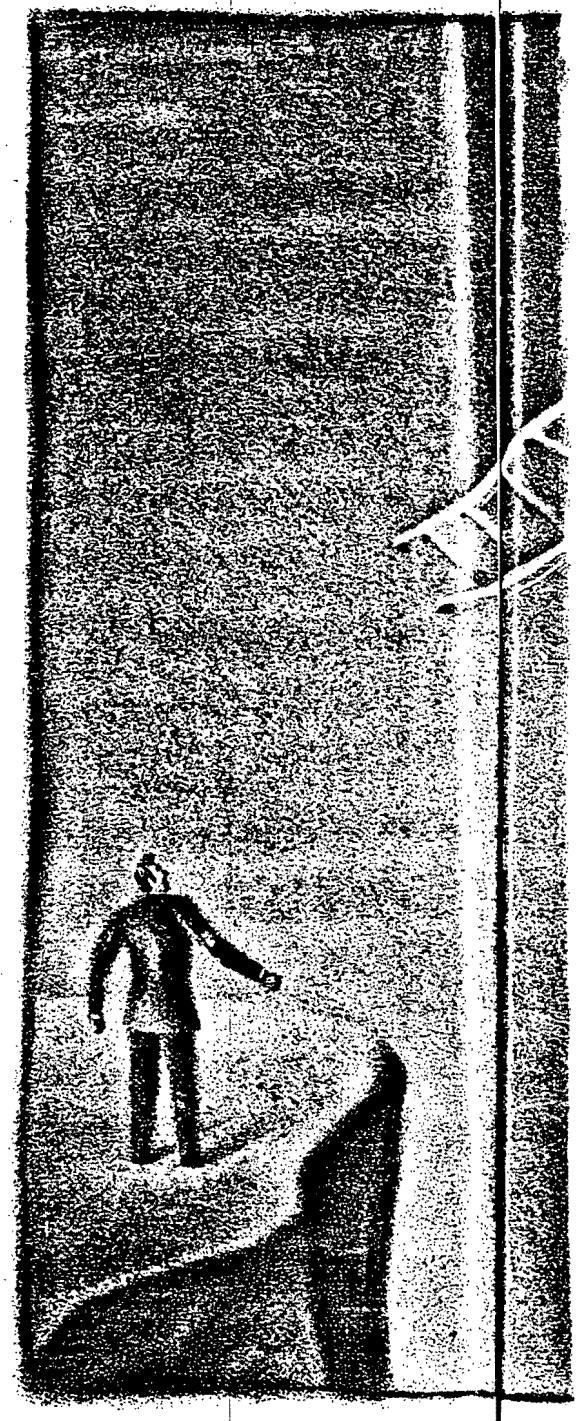
But Klausner returned to the logistics, saying that "diversifying every single department in a high school, every single second grade in every elementary school and every sixth grade in every middle school" was impossible.

—Russ Bleemer is law editor of the New Jersey Law Journal. *This article was distributed by the American Lawyer News Service.*

PRESERVATION PHOTOCOPY

AFFIRMATIVE ACTION ON THE EDGE

A divisive debate begins over whether women and minorities still deserve favored treatment



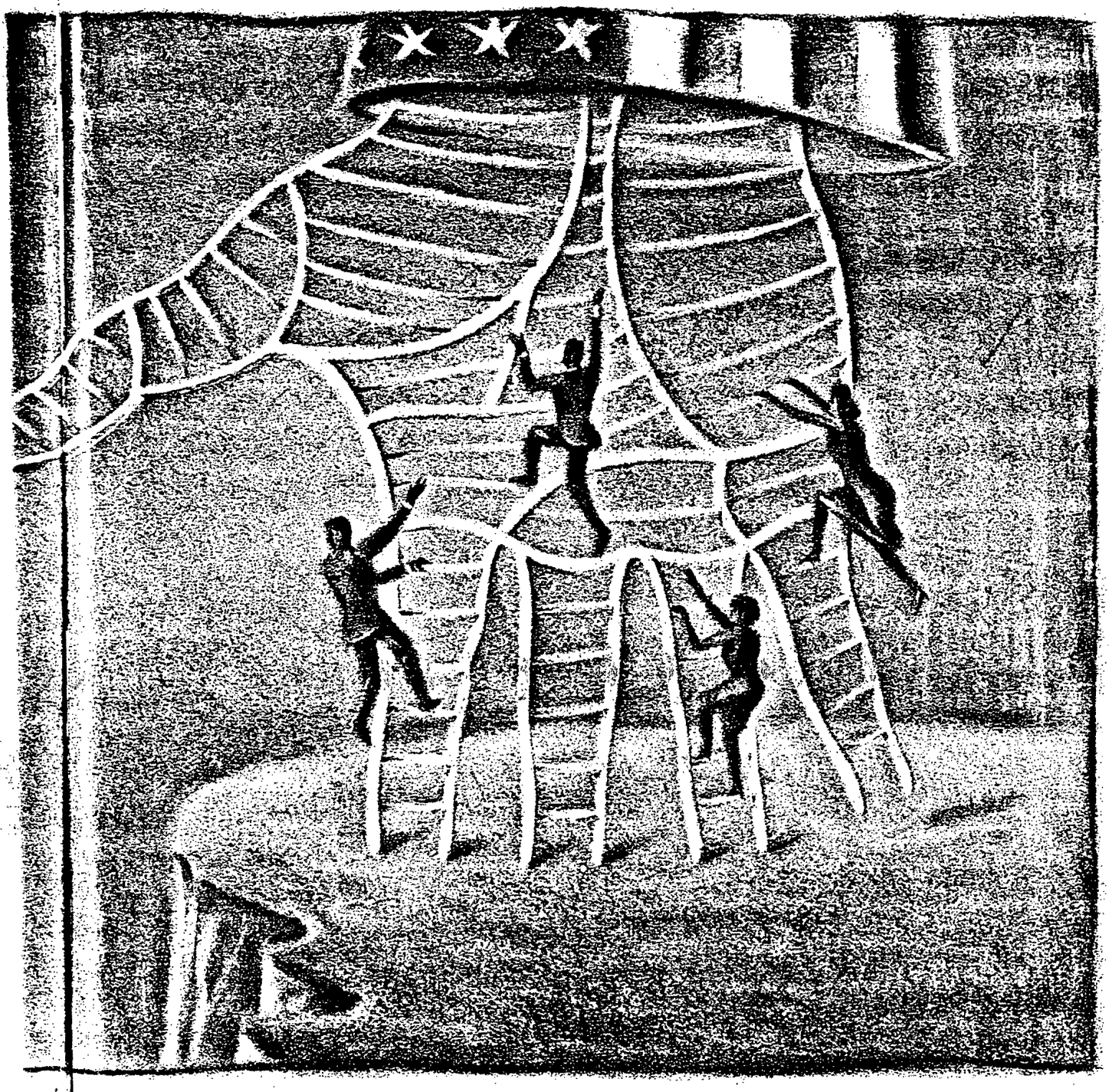
Affirmative action is a time bomb primed to detonate in the middle of the American political marketplace. Federal courts are pondering cases that challenge racial preferences in laying off teachers, awarding contracts and admitting students. On Capitol Hill, the new Republican majority is taking aim at the Clinton administration's civil rights record. On the campaign trail, several Republican presidential hopefuls are already running against affirmative action. And in California, organizers are trying to put an initiative on next year's ballot banning state-sanctioned "preferential treatment" based on race or gender.

IN 1990, 62,100 CHARGES WERE FILED WITH THE EEOC. LAST YEAR THE NUMBER WAS 91,200.

This increasingly angry and divisive debate about the role of race and gender in modern America could help the Republicans unseat Bill Clinton in 1996 and change the way many institutions allot jobs, business and benefits. A recent *Wall Street Journal*/NBC News survey found that 2 out of 3 Americans, including half of those who voted for President Clinton in 1992, oppose affirmative action. The *Los Angeles Times* found 73 percent of Californians back the ballot initiative. "The political implications are enormous," says Will Marshall of the Democratic Leadership Council, a moderate group. "Obviously, a lot of Republicans look at affirmative action as the ultimate wedge issue."

The assault on affirmative action is gathering strength from a slow-growth economy, stagnant middle-class incomes and corporate downsizing, all of which make the question of who gets hired—or fired—more volatile. Facing attacks on such a broad front, women's groups, civil rights organizations and other defenders of affirmative action are circling their wagons. Women and minorities still need preferential treatment, they argue, because discrimination still exists, causing blacks and other minorities to lag far behind whites in terms of economic status. "If African-Americans are taking all these jobs," asks Barbara Arnwine of the Lawyers Committee for Civil Rights Under Law, "why is there double-digit unemployment in the African-American community?" Adds Patricia Williams, a professor at Columbia Law School: "There is this misplaced sound and fury about nothing. Access is still very limited, and the numbers are still very low."

But the sound and fury are real. Affirmative action poses a conflict between two cherished American principles: the belief that all Americans deserve equal opportunities and the idea that hard work and merit, not race or religion or gender or birthright, should determine who prospers and who does not. In 1965, Lyndon Johnson defended affirmative action by arguing that people hobbled by generations of bias could not be expected to compete equally. That made sense to most Americans 30 years ago, but today many argue that the government is not



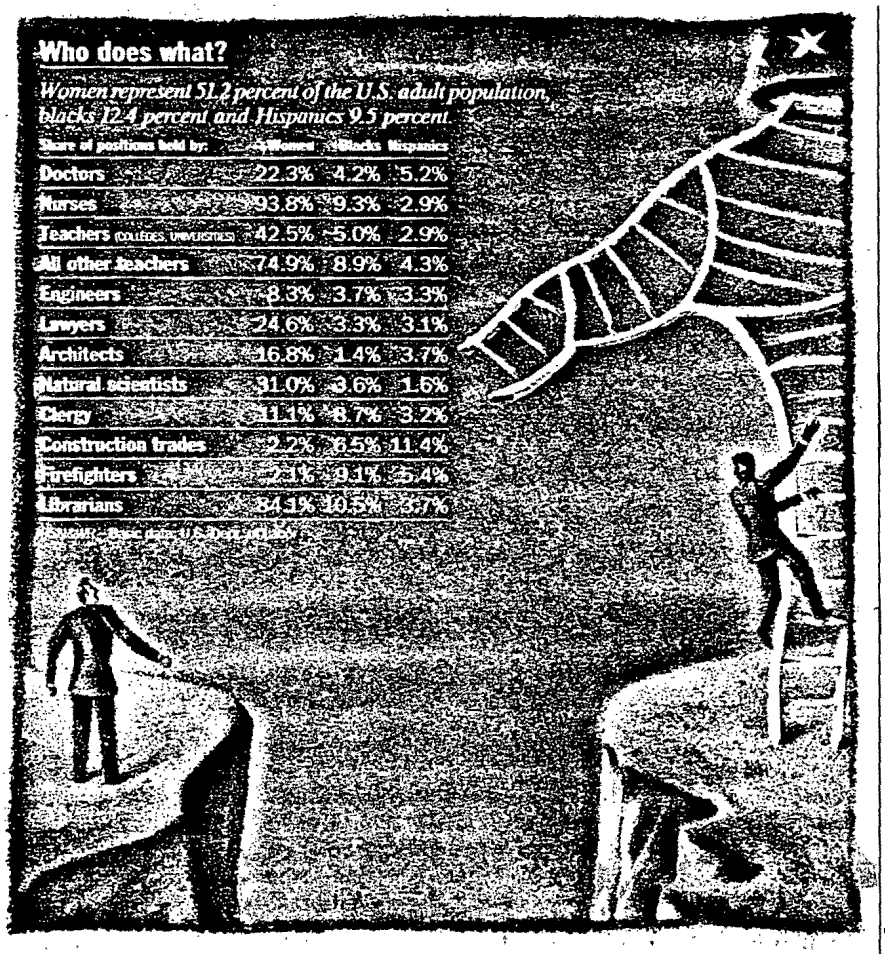
simply ensuring that the race starts fairly but trying to decide who wins it.

Moreover, many women and racial minorities are no longer disadvantaged simply because of their race or gender. Indeed, most of the young people applying for jobs and to colleges today were not even born when legal segregation ended. "I'll be goddamned why the son of a wealthy black businessman should have a slot reserved for that race when the son of a white auto-assembly worker is excluded," says a liberal Democratic lawmaker. "That's just not right."

Disheartening. The critics of affirmative action include some conservative minority and women's leaders who believe it has a destructive effect on their own communities. Thomas Sowell, the black economist, argues that affirmative action has created a process of "mismatching," in which competition for talented minorities is so fierce that many are pushed into colleges for which they are not ready. "You can't fool kids," says Linda Chavez, a Hispanic activist. "They come into a university, they haven't had the preparation, and it's a very disheartening experience for some of them."

Others say affirmative action causes co-workers to view them with suspicion. "White skepticism leads to African-American defensiveness," says Sharon Brooks Hodge, a black writer and broadcaster. "Combined, they make toxic race relations in the workplace." Glenn

ILLUSTRATIONS BY SAM HUNDLEY FOR USN&WR



change would produce. James Wall, national director of human resources for Deloitte & Touche LLP, a management consulting firm, says diversity is good business: "If you don't use the best of all talent, you don't make money."

Even so, the combination of old resentments, new economic hardships and shifting political winds threatens to explode. "There's a great deal of pent-up anger beneath the surface of American politics that's looking for an outlet," says conservative strategist Clint Bolick of the Institute for Justice. It's the same anxiety that helped pass Proposition 187 in California, which sharply restricts public assistance to the children of illegal immigrants, and thwarted Clinton's plan to push a Mexican aid plan through Congress. "If there is a squeeze on the middle class," says GOP pollster Linda Divall, "people get very vociferous if they think their ability to advance is being limited."

FIFTY-ONE PERCENT OF WHITES SAY EQUAL RIGHTS HAVE BEEN PUSHED TOO FAR IN THE U.S.

Some African-American leaders insist that this white-male anger is being stirred up by demogogues who make blacks and women into scapegoats. Says Derrick Bell, professor of law at New York University: "There is a fixation among so many in this country that their anxieties will go away if we can just get these black folks in their place."

But the anxieties are strong and are coupled with a growing belief that affirmative action is another aspect of intrusive and inefficient big government. "The real back-to-basics movement is not in education but in politics," says William Bennett. "We're rethinking basic assumptions about government."

Accordingly, the fight over affirmative action is playing out in four arenas:

■ **California.** The real question is whether the civil rights initiative will appear on the primary ballot in March of 1996 or on the general-election ballot. If it appears in November, the measure could seriously damage President Clinton's chances to carry the nation's most populous state. That is precisely why national Republicans are promising to raise money for the effort—as long as organizers aim for November.

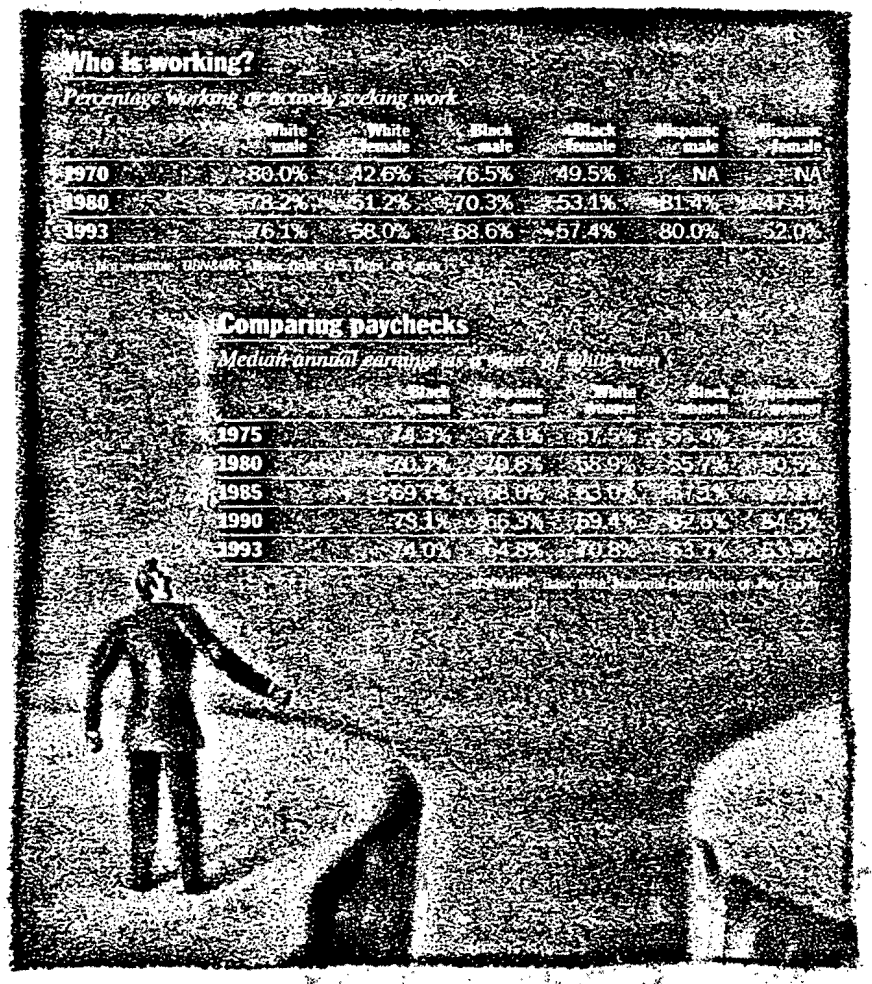
The initiative is the brainchild of two academics, Tom Wood and Glynn Custred, who say they were alarmed by the prevalence of "widespread reverse discrimination" in the state's college system. The initiative has already attracted some unlikely support: Ward Connerly, a black member of the University of California Board of Regents, said last month that he favors an end to racial and gender preferences. "What we're doing is inequitable to certain people. I want something in its place that is fair." And Hispanic columnist Roger Hernandez wrote: "I've never understood why Hispanic liberals, so sensitive to slights from the racist right, don't also take offense at the patronizing racists of the left who say that being Hispanic makes you an idiot."

California Assembly Speaker Willie Brown, who is black, opposes the initiative as an attempt "to maintain white America in total control." But other Democrats are scurrying for cover. "The wedge potential is absolutely scary," says Ron Wakabayashi, director of the Los Angeles County Human Rights Commission. "The confrontation of interests looks like blacks and Latinos on one side and Asians and Jews on the other."

■ **The courts.** The Supreme Court has generally supported race and gender preferences to remedy past discrimination, but an increasingly conservative bench has moved to limit the doctrine. In 1989, the court struck down a program in Richmond, Va., that set aside 30 percent of municipal contracts for racial minorities, and that decision set off a flurry of litigation. In the current term, the court already has heard arguments in a key case: A white-owned construction company is claiming that it failed to get a federal contract in Colorado because of bonuses given to contractors that hire minority firms.

In another case making its way toward the high court, a black teacher in Piscataway, N.J., was retained while an equally qualified white teacher was fired, in the name of diversity. The Bush administration sided with the white teacher after she sued the school board. The Clinton administration backs the board. Two other cases relating to education are also moving forward. In one, white students at the University of Maryland are challenging a scholarship program reserved for minorities (story, Page 38). In the other, the University of Texas law school is being sued for an admissions policy that lowers standards for blacks and Hispanics.

While most court watchers do not expect sweeping changes in current doctrine, the high court is closely divided on racial-preference questions, and the de-



Loury, an economics professor at Boston University, says proponents of affirmative action have an inferiority complex: "When blacks say we have to have affirmative action, please don't take it away from us, it's almost like saying, 'You're right, we can't compete on merit.' But I know that we can compete."

William Bennett, former education secretary and a leading GOP strategist, says that "toxic" race relations, aggravated by affirmative action, have led to a damaging form of re-segregation: "Affirmative action has not brought us what we want—a colorblind society. It has brought us an extremely color-conscious society. In our universities we have separate dorms, separate social centers. What's next—water fountains? That's not good, and everybody knows it."

THIRTY YEARS AGO, 18 PERCENT OF BLACK FAMILIES WERE MIDDLE-CLASS. TODAY: 40 PERCENT

But supporters of affirmative action maintain that arguments like Bennett's are unrealistic—even naive. "We tried colorblind 30 years ago, and that system is naturally and artificially rigged for white males," says Connie Rice of the NAACP Legal Defense and Education Fund. "If we abandon affirmative action, we return to the old-boy network."

Voices on both sides of the debate are starting to discuss a possible compromise that would focus eligibility on class, instead of on race or gender. For example, the son of a poor white coal miner from West Virginia would be eligible for special help, but the daughter of a black doctor from Beverly Hills would not. "Some of the conventional remedies don't work as one might have hoped," says University of Pennsylvania law professor Lani Guinier, whose ill-fated nomination as Clinton's chief civil rights enforcer sparked a storm of protest from conservatives. "Perhaps there is an approach that does not suggest that only people who have been treated unfairly because of race or gender or ethnicity have a legitimate case."

No one questions the sensitivity of the subject. For years, the civil rights lobby, backed by Democrats in Congress, was so strong that critics often felt intimidated. Even today, Democrats who disagree with affirmative action are reluctant to voice their doubts. "The problem is political correctness—you can't talk openly," says a member of Congress.

Democrats *are* talking privately, however, urging the White House to formulate a response to the antiaffirmative-action wave before it swamps the president and the party. At the Justice Department, chief civil rights enforcer Duval Patrick is ready: "We have to engage; we can't sit to one side."

But despite the fact that the California initiative could cost Clinton a must-win state in 1996, the administration seems sluggish, even paralyzed. Laments a senior adviser, "We're going to wait until it's a crisis before reacting." White House political strategists admit one reason for the inaction: The issue is a sure loser.

Referee? Caught between angry white males and the party's traditional liberal base, White House advisers think the best they can do is position the president as an arbiter between two extremes. In a recent interview with *U.S. News*, the president voiced his aim this way: "What I hope we don't have here, and what I hope they don't have in California, is a vote that's structured in such a way as to be highly divisive, where there have to be winners and losers and no alternatives can be easily considered." Asked his views on affirmative action, the president tried—as he often does—to please both sides: "There's no question that a lot of people have been helped by it. Have others been hurt by it? What is the degree of that harm? What are the alternatives? That's a discussion we ought to have."

But a senior administration official admits that the middle ground will be an uncomfortable place: "The civil rights groups are going to say we're caving in if we make any compromises. And the Republicans are going to shout, 'Quotas.' " That same tension is already developing within the White House. *U.S. News* has learned that Chief of Staff Leon Panetta is quietly asking friends on Capitol Hill whether the president should simply endorse the California initiative—a position sure to trigger outrage among the president's more-liberal advisers.

Unsure how resolute the White House will be, civil rights groups are looking for their own strategy to defend affirmative action. One of their main jobs, they say, is to debunk the "myth" that unqualified women and minorities are being hired in large numbers. And some of the best salesmen for affirmative action are big corporations that adjusted long ago to the demands for a more-diverse work force, dread bad publicity and fear the uncertainty

ciding votes could be cast by Justice Sandra Day O'Connor. Legal analysts cite her opinion in a 1993 case challenging voting districts that were drawn to guarantee a black winner: "racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions." The court's most likely move: require programs to be more narrowly tailored to remedy past discrimination.

■ **Congress.** Republican victories last year mean that critics of affirmative action now control the key committees and the congressional calendar. A strategy session was held last Friday at the Heritage Foundation, a conservative think tank, bringing together about two dozen Hill staffers, lawyers and conservative activists. Already, Rep. Charles Canady, the Florida Republican who heads the key House subcommittee, has written to the Justice Department requesting every document relating to affirmative action cases. His goal: oversight hearings that try to demonstrate that the administration's civil rights policies far exceed the original intent of Congress.

Conservatives are considering amendments to appropriations bills that would restrict the administration's flexibility. There also is talk of a measure banning racial and gender preferences altogether. Civil rights proponents remain confident that Clinton would veto any measure that eviscerates affirmative action and that his veto would survive.

■ **Campaign '96.** The affirmative action issue will be test-marketed this year by Buddy Roemer, a Republican candidate for governor of Louisiana. But it is already intruding into the politics of 1996: California Gov. Pete Wilson has all but endorsed the initiative and Sen. Phil Gramm of Texas, who will soon announce his presidential candidacy, has taken over the appropriations subcommittee that handles the Justice Department. He will use it, predicts an administration official, "as a platform to rail against quotas."

The danger for Republicans lies in going too far in attacking affirmative action and courting resentful white males. If the antiaffirmative-action campaign "turns into mean-spirited racial crap, to hell with it," William Bennett warned fellow Republicans.

But the questions at the core of the affirmative action debate remain unanswered. How much discrimination still exists in America? And what remedies are still necessary to aid its victims? ■

BY STEVEN V. ROBERTS WITH JEANNYE THORNTON, TED GEST, MATTHEW COOPER, ROBIN M. BENNEFIELD, KATIA HETTER, JENNIFER SETER, SCOTT MINERBROOK IN NEW YORK AND MIKE THARP IN LOS ANGELES

FOUR TALES FROM THE TRENCHES

Banneker scholar. *Ziedah Ferguson is taking journalism classes at Maryland.*

COLLEGE PARK, MARYLAND

HOW MUCH IS ENOUGH?

A merit scholarship program for blacks is under attack in court

The lawsuit, which may go all the way to the Supreme Court, started over money. Daniel Podberesky, a white student at the University of Maryland, complained that the school offered full scholarships that were available only to high-achieving black students. He sued the university over its policy of reserving some merit scholarships by race—and won.

Podberesky's case, which the university will appeal to the U.S. Supreme Court in the next few weeks, could overturn the way American universities hand out financial aid. At issue are not only the responsibility of schools for correcting past discrimination and their desire to create a more diverse student body but also an important question about the future: At what point should affirmative action remedies be stopped because they have accomplished their purpose?

SOME 67 PERCENT OF WHITE HIGH SCHOOL GRADUATES AND 53 PERCENT OF BLACKS ENROLL IN COLLEGE.

Maryland's president, William Kirwan, says the school has a "special obligation to attract larger numbers of African-American students." Until 1954, he notes, the College Park campus was segregated, and for many years afterward it remained inhospitable to black students. The Benjamin Banneker Scholarship, the target of Podberesky's lawsuit, was created in 1979 as part of the school's efforts to answer a federal desegregation order, which remains in effect today.

By almost all accounts, the Banneker program has enriched the campus. It recruits outstanding African-American students who often become campus leaders and help bridge the gaps between black and white students. Ziedah Ferguson, like many Banneker scholars, turned down more-prestigious schools for the full scholarship at Maryland and the stature on campus that comes with it. "As Banneker scholars, we understand that our purpose is not just to be straight-A students," says Ferguson, a junior from Long Island, N.Y., who works for the school's radio and televi-

JEFFREY MACMILLAN—USN&WR

sion station and is active in student government. "We knew we were accepting leadership roles." As a result of such involvement, white-run student groups, including the Student Government Association and the *Diamondback*, the student newspaper, have taken stands in support of the scholarship program.

Support system. Black students and faculty concede that Maryland is now more hospitable than most college campuses. A recent survey in the journal *Black Issues in Higher Education* found that among predominantly white schools, Maryland awarded the second highest number of baccalaureate degrees to black students in 1991. Twelve percent of its students are black, compared with 8 percent nationwide. Black students also run their own programs, including a lecture series and two newspapers. A $3.7 million black cultural center is now under construction.

Critics of the Banneker program cite the university's impressive record as one reason for ending the race-based merit scholarship. Podberesky's father, Samuel, an attorney for the U.S. Department of Transportation who filed the original suit, suggests that even without the Banneker money, black students would choose Maryland for its diversity and its desirable location close to Washington and Baltimore.

The senior Podberesky's main objection, however, is about fairness. He argues that schools have "a finite amount of money" and that to earmark a scholarship by race "deprives other people who may be worthy of getting the money." The Banneker scholarships go to just 139 of Maryland's 23,000 undergraduates, but the $1.2 million program made up 15 percent of this year's state-supported unrestricted aid.

Without the prestigious scholarships, top black students would likely choose other universities. Even now, up to 40 percent of those offered Bannekers turn them down each year, opting for more renowned schools, majority-black institutions or better aid packages elsewhere.

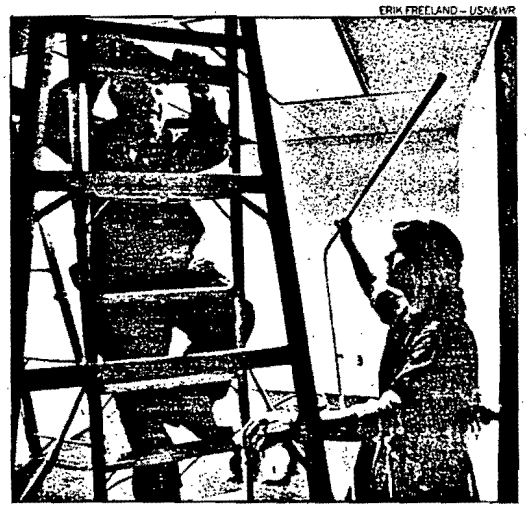
Roughly two thirds of U.S. universities earmark some scholarship money exclusively for minority students. For the most part, merit scholarships have been less controversial than other affirmative action remedies because they go only to well-qualified students who do not need help to compete in school. Maryland, like most campuses, has its share of racial tension between blacks and whites. But the presence of Banneker scholars seems to reduce hostility and promote racial understanding by chipping away at the stereotypes of white students who assume that their black counterparts are necessarily subpar students. Corey Davis, a Banneker scholar from Teaneck, N.J., says that white students come "to know us—we put a face on the issue." On today's fractious and segregated campuses, that sense of recognition may be worth cherishing.

BY JOSEPH P. SHAPIRO

JEFFREY MACMILLAN – USN&WR

Campus leader. *Banneker scholar Corey Davis is a columnist for the student newspaper.*

ERIK FREELAND – USN&WR



Foreman. *Renee Miles was boss on a YWCA job.*

MILWAUKEE, WISCONSIN

WOMEN IN HARD HATS

The YWCA is training a new breed of construction worker

While a political counterattack against affirmative action gathers steam across the country, in Milwaukee, Julia Taylor, the head of the local YWCA, is slowly ushering women into a traditional male bastion—the high-paying, high-skilled, building trades—more or less peacefully.

The YWCA has found that while quotas and set-asides provoke anger, plumbing contractors will hire women who serve the required four years as an apprentice. Labor unions will accept women painters if they carry their own ladders. And men don't harass a woman who is willing to climb a 35-foot telephone pole and hook up a transformer.

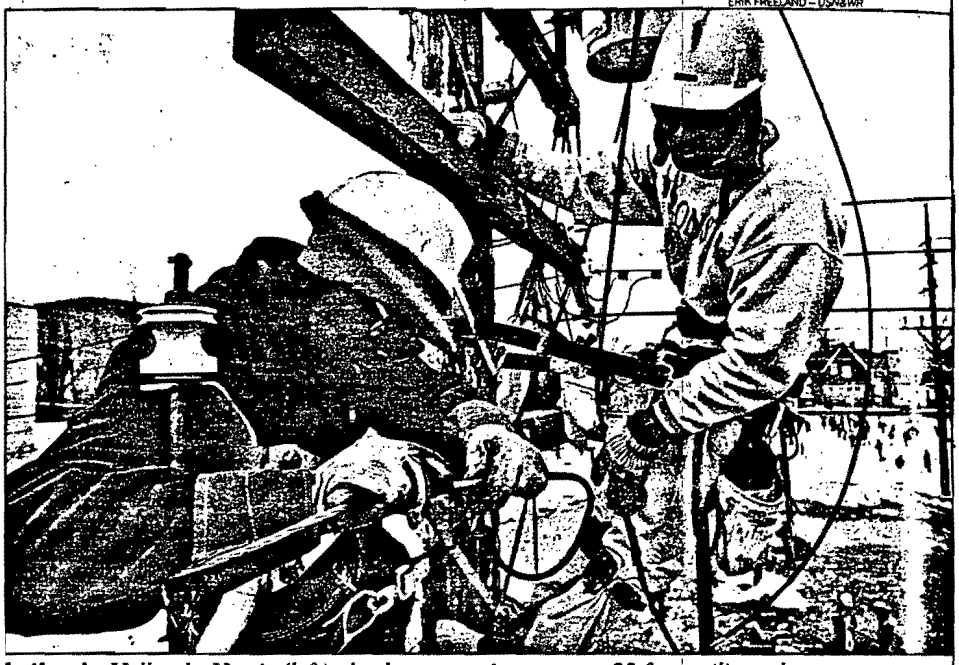
The YWCA has gone into the business of finding and training such women. It is teaming up with Payne & Dolan Inc., an asphalt contractor, to provide women and minority workers for highway road crews. Under a one-year, $178,600 pilot program created last month by the Wisconsin Department of Transportation, the YWCA will screen some 300 people to find about 60 women and minorities with strong work ethics, clean driving records and a willingness to endure the rigors of roadwork. Payne & Dolan and other contractors are expected to hire the workers and provide additional, on-the-job training. "Where in the past everything from the federal government has been mandated, this is a partnership,

a customer-supplier relationship," says Dawn Pratt, the director of employee development at Payne & Dolan.

The YWCA has also funded two inner-city development projects this year: the YW Villages and an Enterprise Center. Armed with $14 million in construction contracts, the YWCA has required that 50 percent of all businesses on its projects have women or minority owners and that women and minorities make up 50 percent of the work force.

Pool of talent. It has exceeded those goals, in part by providing trained workers. The YWCA's First Source program supplies a pool of 80 to 100 skilled women to building-trades contractors. "The contractors say, 'We can't find qualified people,' " says the YWCA's Taylor. "We say we have a pool of qualified people." Adds Nancy Hoffmann, the head of the YWCA's nontraditional employment training program: "We talked about how we could help them achieve our goal rather than leave it on their backs."

ERIK FREELAND – USN&WR



In the air. *Yullonda Harris (left) checks connections atop a 35-foot utility pole.*

The women work hard to learn their skills. Yullonda Harris has been climbing utility poles since August, learning to be a line mechanic. On a cloudy, chilly morning, in a limbless forest of telephone poles set up on a vacant lot, she perched atop a 35-foot pole and hoisted a 71-pound gin-arm over her head; the device holds the block and tackle used to lift a transformer into position.

IN 1970, ABOUT 4 WORKERS IN 10 WERE WOMEN. BY 2005, PROJECTIONS SAY, 6 IN 10 WILL BE FEMALE.

Meeting the 50 percent women and minorities targets for the Enterprise Center will boost costs of the $4 million project by $100,000. "It's going to cost more on this job because the contractors have to invest more in training, in recruiting and in retention," says Taylor. "We're paying for that."

Despite the YWCA's efforts, women are still only about 2 percent of the four-county Milwaukee area's 20,000-strong construction work force. And for every union such as Painters Local 781, where Business Manager Wally Kangas welcomes skilled women, there are holdouts. Operating engineers, for instance, don't think women should be driving bulldozers.

But changing demographics may require new attitudes. Already, some unions and businesses such as Outboard Marine Corp. are finding themselves looking for women and minorities to replace skilled white males who are retiring – and whose sons are going to college instead of following their fathers into a trade.

Nevertheless, the YWCA still sees a need for affirmative action requirements in government contracts. "Were it not for affirmative action, there would not have been pressure on companies to give women the opportunity to succeed or fail," says Hoffmann. She started as a plumber's apprentice in 1979 because the law required the trades to accept women; she worked to become a master plumber. "I was naive," she says. "I didn't realize women didn't become plumbers."

BY BRUCE B. AUSTER

FRAUD AND ABUSE

Trying to beat the system

When F. A. Taylor & Son won an $850,000 contract for roofing repairs at Baltimore-Washington International Airport, it met Maryland's minority participation goals by awarding an $85,000 subcontract to a black-owned firm called Roofex Inc. But when invoices from the two firms didn't seem to match up, state officials began to think something was fishy.

They were right. Investigators found that Taylor did all the work and Roofex did none, but the firms collaborated in falsifying payrolls and backdating invoices. Taylor also wrote checks to Roofex, but Roofex kicked back most of the money, keeping only a prearranged "fronting fee." Taylor owners David and Richard Taylor and Roofex President Alfred Motlow all pleaded guilty in 1991 to felony fraudulent concealment.

The headlines such tales generate often overshadow whatever benefits set-aside programs may provide. In 1993, the *Boston Herald* documented massive malfeasance in the minority-set-aside program for Boston Harbor's $3.4 billion cleanup. Denver District Attorney Bill Ritter is probing irregularities in the minority contracting program for Denver's new $4.2 billion airport (story, Page 48). And a Baltimore grand jury reported in 1992 that "widespread systematic abuse" was undermining Maryland's minority business enterprise program.

Scams. Some white-owned firms simply submit false documents to win government "certification" as a legitimate minority business. Businesses owned by women frequently turn out to have been previously owned by their husbands. The

ST. LOUIS, MISSOURI

BLACK AND BLUE

A top cop's painful rethinking of race-based preferences

St. Louis Police Chief Clarence Harmon never dreamed he'd be fighting against the forces of affirmative action. But that was before last December, when the police department announced the results of an exam taken by officers vying to become sergeants. Though blacks made up about 30 percent of the test takers, they had only 16 percent of the top scores.

In a city that is roughly half African-American, the test results put Harmon, St. Louis's first black police chief, in an awkward political position. Things grew worse when the head of a local black police organization, Dennis McLin, presented reporters with copies of the confidential sergeants exam. The exams, McLin contended, had been mailed to him after being circulated among white officers before the test was given. "That's why we tend to score lower than whites," McLin said.

At the behest of the Board of Police Commissioners, Harmon launched an inquiry and found that the theft had occurred after the officers took the exam. Because the test results had not been compromised, Harmon argued, the scores should stand. That position earned him the gratitude of white officers, especially those who scored well on the exam, but the derision of some African-Americans. One letter in a black newspaper from a retired police officer called the chief "a disgrace to your race." St. Louis's black mayor, Freeman Bosley Jr. (who has feuded with Harmon over control of the department), called, without success, for an independent investigation.

IN 1972, 10 PERCENT OF PROTECTIVE-SERVICE WORKERS WERE BLACK. IN 1993, IT WAS 17 PERCENT.

Ironically, it was Harmon who, in 1980, pushed the police department to adopt its first-ever affirmative action plan, which resulted in the hiring and promotion of hundreds of black and female police officers. Today, sitting in his corner office with a view of the Gateway Arch, Harmon muses on how he arrived at a position on race and gender preferences that is "almost 180 degrees from where I was."

His doubts first arose in the mid-1980s. Then commander of internal affairs, Harmon began noticing that in its haste to meet affirmative action goals, the department was hiring black recruits who scored relatively poorly on entrance exams. In discussions with other high-ranking black officers, Harmon worried that the new recruits would have trouble competing with their white counterparts for promotions. "It got to the point where we were wondering if this was being done by design," the chief recalls.

Like many blacks who joined the force in the 1960s and early 1970s, Har-

JIM LO SCALZO – USN&WR

Caught in the middle. *Police Chief Harmon (right) with Lt. Joseph Richardson*

RICH FRISHMAN FOR USN&WR

Bus tunnel. *One disputed Seattle project*

Justice Department has charged construction giant Peter Kiewit Sons Inc. with using one minority and one woman-owned firm as captive fronts to win contracts on three Seattle-area projects. The firm's attorney says the charges are groundless. The case is in discovery.

Oversight of affirmative action programs is often lacking. A recent audit revealed that 46 out of 65 firms certified as minority- or women-owned by the Denver mayor's Office of Contract Compliance did not meet the city's criteria. The audit said an estimated $34 million in city contracts was awarded to the ineligible firms over a three-year period. Prosecutions or even hefty fines are relatively rare, and "that lack of enforcement allows and even fosters abuse," says Ted Webster, a prominent minority contractor in Boston, where enforcement has been stepped up since the embarrassing press reports.

Some observers claim there are not always enough capable minority firms to meet a project's goals, so general contractors fearful of losing the business use front companies to reach the targets. Minority contractors usually don't buy that excuse but admit that their cohorts' collusion in such schemes only adds to the problem. The result can be a system that does more harm than good.

BY GORDON WITKIN

mon and his contemporaries had taken pride in competing head-to-head with whites even as they fought for affirmative action goals. Yet in the 1980s he and his colleagues were noticing that too many younger black officers were using affirmative action as a kind of crutch. "Some of my younger colleagues will be loath to admit this," says the chief delicately, "but for many of them affirmative action has meant that they didn't have to do some of the things they should have done to compete."

The main mechanism of affirmative action in most big-city police departments was something called "race norming," reworking test results to achieve racial balance. In St. Louis, race norming worked like this: Some blacks who scored in lower "clusters" (groups of candidates who achieved approximately the same scores) would be advanced ahead of some whites who scored in higher clusters.

WOMEN REPRESENTED 6 PERCENT OF THE PROTECTIVE-SERVICE WORK FORCE IN 1972. IN 1993: 17 PERCENT.

Mixed emotions. Harmon saw this "cluster dipping" as a justified means of compensating blacks for years of being systematically held back by white commanders. But he also had "mixed emotions" about the practice, specifically the way it angered whites who were passed over for promotions. So did Congress, which outlawed race norming in the 1991 Civil Rights Act. After reading the statute, Harmon persuaded the St. Louis police board to stop cluster dipping. That didn't stop some white officers who had been passed over from suing for—and winning—their sergeant's stripes.

In the past, what angered police officers, black and white, more than affirmative action was that an officer generally needed "steam" (political clout) in the form of an "ace" (a political patron) to advance in the St. Louis Police Department. Under Harmon's regime, most officers agree, politics is much less important than test scores.

Next week, the police board will vote on whether to accept or throw out the latest test results. Either decision could spark a lengthy court battle. Meanwhile, race relations within the department, says one headquarters staffer, are "real friggin' tense."

Yet as old-style affirmative action dies in St. Louis, a new and perhaps healthier variety is being born. Two years ago, Harmon began beefing up efforts to recruit higher-quality minority cadets. Today, disparities between black and white cadet test scores are a third of what they were in the late 1980s. With any luck, that narrowing of scores should translate into more promotions for minorities five years from now, when today's cadets are eligible to take the sergeants exam.

BY PAUL GLASTRIS

Waiting. *St. Louis police Officer Gary Wiegert could lose a promotion if test scores are nullified.*

JIM LO SCALZO – USN&WR

LOS ANGELES, CALIFORNIA

A QUEST FOR DIVERSITY

The Los Angeles Times *struggles to mirror a polyglot metropolis*

During the 1992 riots, editors at the *Los Angeles Times* rediscovered an underutilized resource: its black, Latino and Asian-American journalists. They mobilized the minority journalists from their desks and suburban posts to cover the violence, prompting reporters to snicker that they were part of "the *Los Angeles Times* busing program." Within weeks, Dean Takahashi, then a *Times* reporter, wrote an article in *Editor & Publisher* that stated: "Before the riots, the *Los Angeles Times* probably had more people covering Tokyo than we had covering South Central Los Angeles." Takahashi's biting assessment prompted the so-called Newsroom Riot, which spilled into spontaneous and angry arguments among staffers at the newspaper's downtown headquarters.

Those episodes prompted the nation's fourth-largest daily paper to re-examine its news coverage and its hiring and promotion policies. A Unity Coalition was organized; so was a Diversity Committee. The latter met in one of the *Times*'s tony executive dining rooms to draw up reforms. Early in 1993, Editor Shelby Coffey III (who was once editor of *U.S. News*) distributed a now famous "Diversity" memo to the staff. "Rarely can a single person, writing or editing a story, have the full range of experiences to see the story from all angles," he wrote. He adopted most of the committee's recommendations to enhance multicultural awareness and pledged the *Times* to a two-year goal of making at least half of all new hires minority or female.

Mixed results. Two years have passed since Coffey launched his earnest, well-intentioned reform program; other editors have also sought to address the concerns of minorities and make the *Times*'s coverage better reflect the most ethnically diverse metropolis in America. The paper has had some clear successes; it has hired substantial numbers of minority journal-

HEADLINE Agreement Signed on Nabisco Restroom Policy
Oxnard: In response to sex bias claims, firm agrees to reopen previously closed bathrooms but denies any wrongdoing.
Byline: DUNCAN MARTELL
Credit: TIMES STAFF WRITER

DATE 02/04/95

SOURCE THE LOS ANGELES TIMES (LATM)
Edition: Ventura West
Section: Metro
Part: PART-B
Page: 1
Day: Saturday
Desk: Zones

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It took seven hours of negotiating, but officials from the Teamsters and Nabisco have signed an agreement that outlines and clarifies policies regarding restroom usage at the Oxnard plant for its female employees.

The document requires Nabisco to reopen previously closed restrooms, stipulates that 20 employees per shift will be designated to relieve assembly-line workers when nature calls and expands the two break periods by three minutes each, union officials said Friday.

In the document, Nabisco denies it committed "any act of wrong doing against any employee."

The Thursday night talks came after allegations surfaced last month of policies that spurred female employees to wear diapers and sanitary napkins in case they could not make it to the restroom in time.

"We feel absolutely great," said Scott Dennison, secretary-treasurer of the union, which represents more than 500 workers at the 3rd Street plant.

"Now, our responsibility is to hold the company accountable to that agreement. And we will do that."

Still, lurking behind the agreement is yet more disagreement. While the union claimed victory, a Nabisco spokesman said Friday that the talks broke no new ground.

"The meeting was really a clarification of existing policy," Nabisco spokesman Hank Sandbach said. "It was a very helpful and constructive dialogue."

Dennison said in response that such a characterization was inaccurate. "Before, they didn't have any relief workers. Period. . . . Now they're officially designating individuals."

The union stepped in on the workers' behalf after about 30 former and current Nabisco employees, most of them seasonal workers, agreed to file a class-action lawsuit against Nabisco claiming, among other things, sex discrimination. They assert that while men were allowed to use the bathroom at their whim, women employees were not allowed to use the restroom.

Nabisco has, from the beginning, denied the women's claims. "The allegations of sex discrimination are utterly, completely off the wall," Sandbach said. These complaints, he said, "involve a small number of people, seasonal workers. Our belief is that they don't

speak for the vast majority of employees" at the plant.

Attorneys for the women who are preparing to file the lawsuit said they still plan to go ahead with the action.

"The fact that the company and the union have entered into a new agreement would not have an effect on remedies that we would be seeking for our clients for past wrongs," said Eileen McCarthy, a staff attorney for California Rural Legal Assistance, one of the firms handling the case.

None of the women was available for comment Friday.

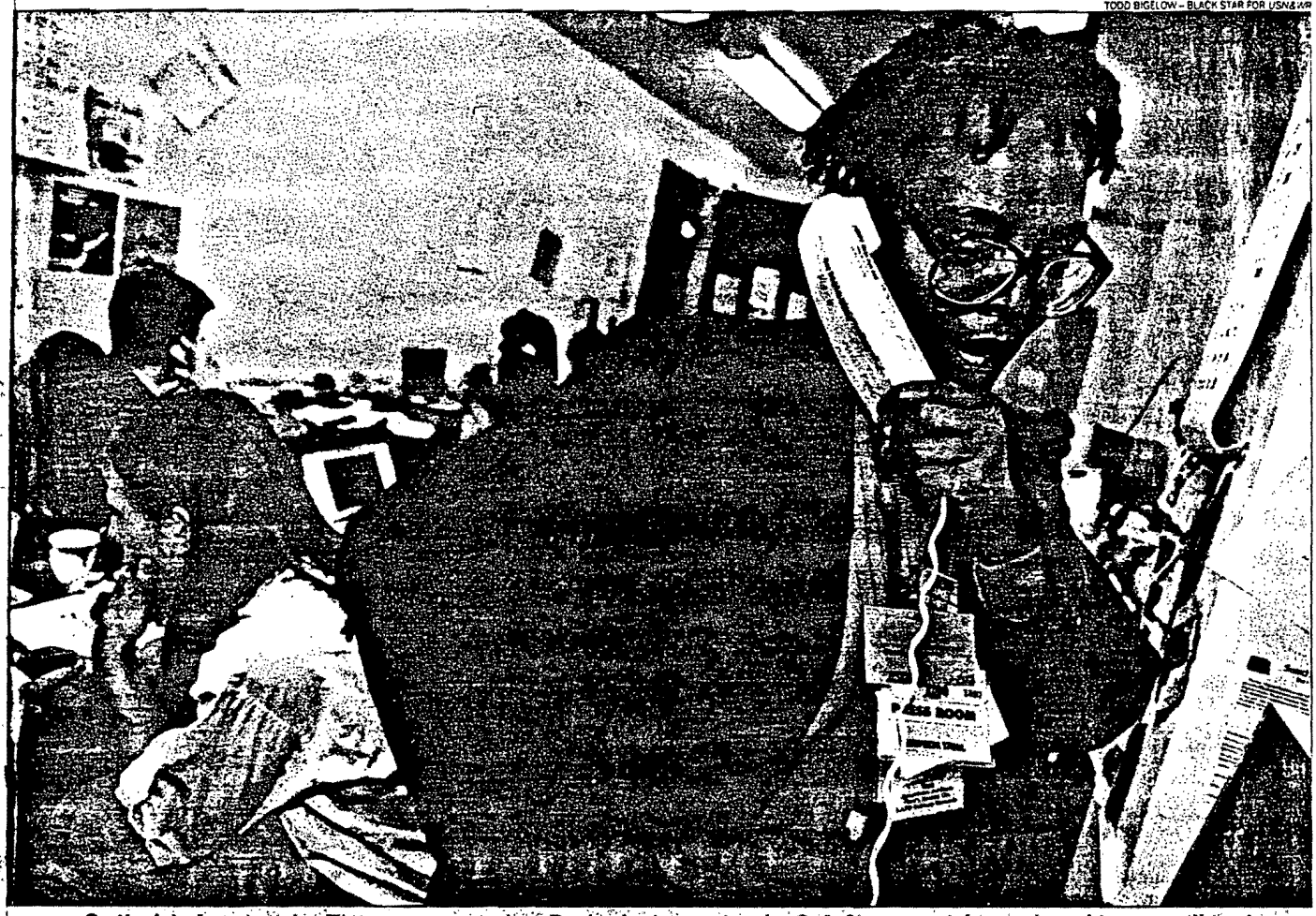
Employees have also filed claims with the Equal Employment Opportunity Commission, to which Nabisco must reply by the middle of this month.

As the EEOC continues to investigate the employees' claims, attorneys for the women say their case is getting stronger.

"Additional information confirming evidence of the allegations is coming in a weekly basis," Gregory Ramirez, lead attorney for the case, said.

Noting the irony in Nabisco's denial, he said, "Why do you think negotiations take so long over something that never happened?"

TODD BIGELOW – BLACK STAR FOR USN&WR



On the job. Los Angeles Times *reporter Andrea Ford, who is covering the O. J. Simpson trial, says that whites are still in charge.*

ists, for example. But it is less clear whether the *Times*'s ardent pursuit of diversity has made it a better newspaper.

The changes are undeniable. Among 852 full-time editorial employees at the end of last year, 19.6 percent were minorities, up from 10.5 percent at the end of 1988 and well above the national average of 10.5 percent for newsroom work forces. In 1994, two thirds of all new hires were women or minorities.

MINORITIES IN NEWSROOMS OF U.S. DAILIES ROSE FROM 4 PERCENT IN 1978 TO 10.5 PERCENT IN 1994.

George White, a black reporter who cochaired the first Diversity Committee, says the new recruitment efforts "can't be called affirmative action." The committee's recommendations, explains White, were about "empowering the staff to improve the workplace environment and the paper as a whole."

Still, Andrea Ford, the local head of the National Association of Black Journalists and one of the paper's two main reporters covering the O. J. Simpson trial, argues that the statistics are misleading. "Walk through the newsroom," she says. "Go to the 3 o'clock meeting [where the next day's paper is planned]. There are no black managers of the city desk or the state desk." Coffey responds that there are more minority department heads and deputy editors today than in the past: "We don't think we're at some magic point where everything in all areas has been solved, but it's part of a process."

One unintended consequence of the new policies is that some staffers question how hospitable the *Times* is to nonminority journalists. Young white males sometimes find themselves consigned to distant bureaus, filing stories but lacking such staff benefits as health care and pensions while they wait for promotions.

Nor is it clear whether the paper's coverage of minority interests has improved. New sections have been added, the City Times and Voices, which expand black and other minority news and features, as well as a weekly Spanish-language tabloid, Nuestro Tiempo. But Joe Hicks, the executive director of the Southern Christian Leadership Conference, says he hasn't "seen any sweeping changes in the way the L.A. *Times* seems to cover stories – or seeks spokespersons representing minority communities."

One prominent Hispanic journalist, who asked not to be identified because his newspaper has a business connection with the *Times*, argues that, "They're just not a good local paper anyway – their focus is on Washington and on international." On the other hand, leaders such as Stewart Kwoh of the Asian Pacific American Legal Center of Southern California believe that the paper has bolstered its coverage of Asian-American communities.

The *Times*'s record suggests at least one lesson: Creating a more diverse newsroom is easier than accurately reflecting the lives of the 4 million residents, more than 100 nationalities and 80-plus incorporated cities that make up the sprawling megalopolis that the newspaper calls home. ■

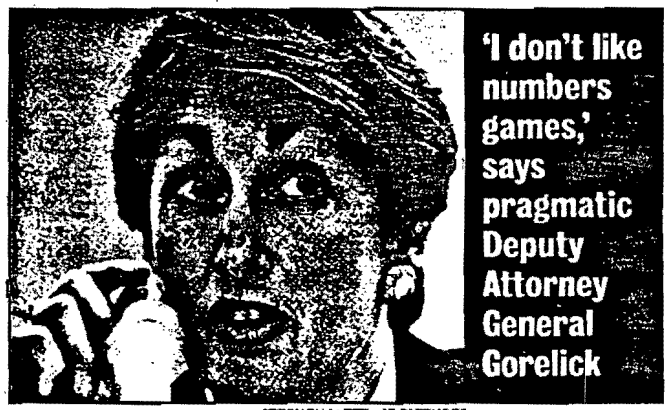
BY MIKE THARP

A Civil Rights Tug of War

Justice: Taking sides over how to enforce the law

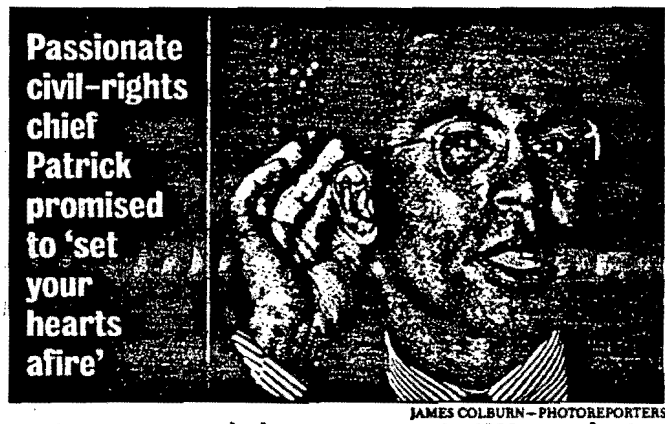
TO THE CLINTON WHITE House, affirmative action is political poison. Blacks would never forgive the president for weakening the Democrats' traditional commitment to civil rights. At the same time, Clinton worries about alienating the "angry white male" vote essential to his re-election in 1996. The battle lines are already forming in California, where voters may put an initiative on the 1996 ballot to abolish minority and gender preferences (following story).

No wonder the president has said very little about affirmative action. The Justice Department, however, doesn't have that luxury. It enforces the law of the land, which clearly permits—and in some cases requires—minorities to be given preference over whites to redress past discrimination. Just how aggressively the federal government should enforce the law has been the subject of a simmering debate among Justice officials in recent months. The discussion, which pits moralists against political pragmatists, illustrates how difficult it is to find middle ground.



'I don't like numbers games,' says pragmatic Deputy Attorney General Gorelick

STEPHEN JAFFE—JB PICTURES



Passionate civil-rights chief Patrick promised to 'set your hearts afire'

JAMES COLBURN—PHOTOREPORTERS

Deval Patrick, chief of Justice's civil-rights division, is an unapologetic defender of affirmative action. An African-American who grew up in the Chicago projects, he won scholarships to prep school, Harvard and Harvard Law. Patrick's swearing-in speech at Justice ("Give us your commitment to equality ... and we will set your hearts afire") was so moving that some listeners wept. When Patrick learned that Clinton planned to speak at Martin Luther King Jr.'s birthplace in Atlanta last month without mentioning civil rights, he quietly refused to appear with the president.

Patrick's sense of principle collided with political reality last year when he took on a reverse-discrimination case in Piscataway, N.J. Faced with declining enrollments, the school board had to decide whether to lay off a white teacher or an equally senior and qualified black teacher. The board chose to keep the black teacher to promote racial diversity in a school with few minority faculty members. The Bush Justice Department had gone to court in 1992 to oppose that decision, but Patrick reversed course and committed Clinton's Justice Department to defending it. To Patrick, the school board's affirmative action was benign: it did not involve quotas, which he says he "scorns."

Conservatives, however, reacted furiously. Patrick was pegged as a "quota lover," and nastier critics began mispronouncing his first name (De-val) as "Devil." In public, both Clinton and Attorney General Janet Reno tepidly endorsed Patrick's position on the Piscataway case, but Reno in particular privately worried about his choice of cases for taking a stand on this issue. Reno is wary of hiring by the numbers. Briefed on the department's support for an affirmative-action plan in Alabama that used numerical goals and timetables, Reno interjected, "I thought we didn't do that." At Justice, the joke is that the administration is eager to have civil-rights laws aggressively enforced—as long as no one knows about it.

It has fallen to Reno's number two, Jamie Gorelick, to lead the search for a compromise standard. A no-nonsense manager, Gorelick is credited with bringing order and purpose to a chaotic department. Her personal goal is a "race-neutral society. I don't like numbers games," she told NEWSWEEK. Though she is a Democrat and friendly with liberals like Patrick, her own views on affirmative action are moderate to conservative.

Tangled history: Sick with the flu over Christmas, Gorelick read up on the tangled history of affirmative action. The decisions of the U.S. Supreme Court were not much help. Though the justices have clearly sanctioned the use of racial preference, they have been confusingly divided over the precise rules.

Gorelick wants an approach that is narrow and carefully calibrated. She would back affirmative action to remedy a clearly demonstrated wrong, like a history of past discrimination against minorities by a state agency. Or she would back it to meet a particular and obvious need, like integrating a white police force in a mostly black city. But she is skeptical about using it for general goals like making society more diverse or to overcome the long-term effects of slavery. Gorelick was away last summer when Justice took on the Piscataway case. Though she publicly supports Patrick's stand, other Justice officials say that she would not have chosen to intervene to defend the layoff of the white teacher.

Because of her caution, Gorelick has been accused by some civil-rights lawyers of selling out. Meanwhile, other Justice officials—and some White House aides—would like to cut back severely on affirmative action. Officially, the Justice Department has reached no overall position. And until the political crosscurrents subside, the Clinton administration will be taking affirmative action one delicate case at a time.

LINCOLN CAPLAN

NEWSWEEK POLL

Have we gone too far in pushing equal rights in this country?

	BLACKS CURRENT	WHITES CURRENT	TOTAL CURRENT/1987*
Agree	31%	54%	51%/42%
Disagree	64%	43%	46%/53%

*TIMES MIRROR.

FOR THIS NEWSWEEK POLL, PRINCETON SURVEY RESEARCH ASSOCIATES TELEPHONED 758 ADULTS, INCLUDING 252 AFRICAN-AMERICANS, FEB. 1-3. THE MARGIN OF ERROR IS +/- 4 PERCENTAGE POINTS FOR THE TOTAL, 5 FOR WHITES AND 8 FOR AFRICAN-AMERICANS. THE NEWSWEEK POLL. © 1995 BY NEWSWEEK, INC.

The End of Affirmative Action

Public Lives: A NEWSWEEK columnist says we may be hurtling toward the most sensitive point in race relations since the 1960s

BY JOE KLEIN

WARD CONNERLY OWNS PRECISELY HALF OF A LAND-use consulting firm in Sacramento. His wife, Ilene, owns the other half. In the perverse world of racial preference politics, this is a rather dramatic statement of moral principle. Connerly is black; his wife is white. "If I were to own, say, 51 percent, we could make a very nice piece of change," he says. Connerly & Associates would then be a *minority*-owned company. A conga line of white contractors hoping to do business with the state of California—and needing to meet affirmative-action guidelines—would come courting. In fact, they do now. "They ask me to go into business with them to be their minority partner," Connerly says. "Look, I was born in Louisiana. I remember drinking from 'colored only' water fountains. That was degrading. But this is almost as bad. I won't be defined as an 'affirmative action' businessman. I want to be judged by the quality of my work."

But Ward Connerly is more likely to be remembered for the quality of his ideas than for the quality of his work. As a member of the University of California Board of Regents, he is leading a campaign to abolish racial preferences in the state university system. A vote will be taken in June. His effort is the first of many, the beginning of a historic turn in America—the probable end of the 25-year attempt to make benign, remedial distinctions according to race and gender. "Affirmative action is dead," Connerly says. "We are negotiating the burial rites."

California's effort to end racial preference is just the first step—the issue could dominate the 1996 election year

JAMES D. WILSON—NEWSWEEK

'I want to be judged by the quality of my work': *Ilene and Ward Connerly*

It's been a curious quarter-century. Affirmative action—the accepted, if imprecise, shorthand for ethnic and gender preference programs—has insinuated itself into every aspect of American public life, and much of the private sector as well. This has been a profound and extremely controversial development, not least because the policy has evolved in virtual silence, with a minimum of democracy—almost entirely by executive order and court fiat, almost never legislatively; almost never the result of a public debate. That, however, is about to change. In California there will be a 1996 ballot question that would forbid the use of ethnicity or gender "as a criterion for either discriminating against, or granting preferential treatment to, any individual or group." This question, also known as the California Civil Rights Initiative (CCRI), is likely to dominate the 1996 election year—including the presidential campaign—much as the anti-illegal-immigrant question (Prop. 187) dominated 1994. Practically no one in California expects it to fail. And even before the CCRI campaign heats up, there will be Supreme Court cases and legislative initiatives in Washington and in many states, almost all of which are likely to narrow the use of racial preferences.

In fact, we may be hurtling toward the most sensitive moment in American race relations since the 1960s—*more* sensitive, in some ways, because a reduction of perceived "rights" seems inevitable. The reaction of the black community is likely to be cold fury, incendiary rhetoric—and a deep sense of despair. "You are putting a formula together to maintain white America in total control so that racial-minority America can never be part of the system," Willie Brown, the state Assembly speaker, has said. The response from white America is likely to be a disingenuous and slightly smarmy call for a "colorblind society." This will be especially galling when it comes, as it so often does, from some of the same people who tried to block "colorblind" civil-rights legislation 30 years ago—and who routinely oppose most efforts to help the poor now.

But if the journey seems destined to be ugly, it might also prove cathartic. "We might as well look each other in the eye and have it out," says Shelby Steele, the black essayist who has written the most psychologically astute analyses of this dilemma. "We might as well talk about white guilt and black dependency, and how disastrous both have been. We might as well end the delusion that white people have it in their power to save us."

Political tide: Affirmative action hasn't been a total failure. The initial impulse certainly was noble. It crystallized a public desire to break down barriers, to include those who'd been excluded in the past. Over time, it has become socially impossible to run any large institution—public or private—in a racially exclusionary manner. But there have been negative consequences as well, and an inescapable conclusion: discrimination can't be cured by counterdiscrimination. It is not only divisive but fundamentally unfair, and, in some ways, the results are more costly for blacks than for whites.

No doubt, the rush to overturn affirmative action is a result of the recent political tide. But there are better reasons than white resentment—and political expediency—for ending this policy now. There is the subtle, stigmatizing impact on minorities—the anguish Ward Connerly feels. There is the institutionalization of different, *lower*, standards for blacks and Latinos, allowing an illusion of progress, an illusion that evaporates quickly, and cruelly, when the beneficiaries are forced to compete in the real world. There is the disastrous impact on civil society when the fundamental American notion of individual rights is supplanted by "group entitlement," as in the racial gerrymandering that has re-segregated electoral districts in

the South. There is, finally, reality: most of these programs haven't worked very well—at least in public-sector areas like the granting of contracts, and in semipublic areas like college admissions. (A case can be made that private, voluntary efforts by corporations have succeeded and should survive—but these might be legally challenged by conservatives as well.)

"Affirmative action is a gravy train," says a Los Angeles public official. "It's become a way for black politicians to take care of their friends. Opportunity doesn't expand. The same, small group of businessmen benefit every time." Of course, it could be argued that this generation of black mayors should have the same right to enrich their cronies as earlier, paler pols did. But the legitimization of graft is hardly a worthy legacy of the civil-rights movement. It makes for embarrassing lawsuits—the latest is the Adarand case, now before the U.S. Supreme Court, in which a white, family-owned business in Colorado low-bid a highway contract and lost out to a Latino-owned company, which took advantage of an affirmative-action bonus.

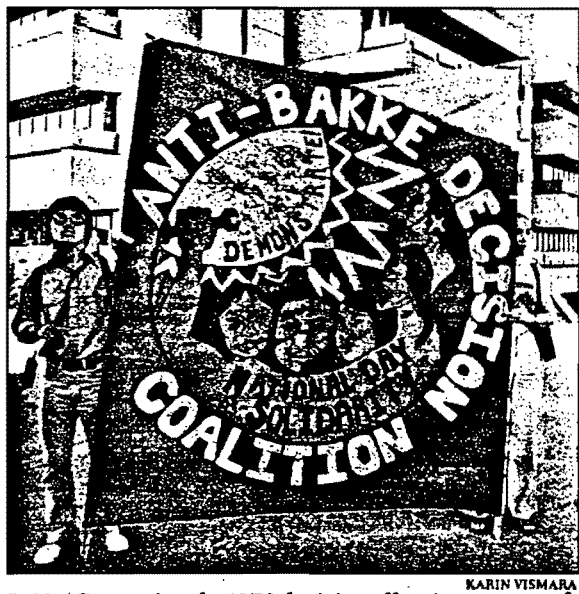
NEWSWEEK POLL

Should there be special consideration for each of the following groups to increase their opportunities for getting into college and getting jobs or promotions? (percent saying yes)

GROUP	BLACKS	WHITES
Blacks	62%	25%
Women	62%	26%
Hispanics	57%	22%
Asians	48%	18%
Native Americans	65%	34%

THE NEWSWEEK POLL, FEB. 1-3, 1995

Racial remedies haven't worked very well in academia, either. The Bakke case in 1978 established race as *one* factor colleges may consider in admissions, but it clearly has become more important than that. As Jeffrey Rosen recently noted in The New Republic, "only one out of the 280 black applicants to [the University of Texas Law School] in 1992 had a score high enough" to be admitted without a racial preference. Those who *do* get in are often tossed into an environment where they can not succeed. The conservative black intellectual Thomas Sowell has called the phenomenon "mismatching"—students who might do very well at their local state college are accepted into elite institutions where the competition for grades is intense. As of 1993, two out of every three blacks who entered college didn't graduate.



KARIN VISMARA

Bakke: *Protesting the 1978 decision allowing race as a factor in admissions*

The noble impulse crystallized a desire to break down barriers, but the results are more costly for blacks than for whites

The California Civil Rights Initiative has its roots in the bizarre racial politics of the state's public university system, where the blatant recruiting of minority faculty members, regardless of merit, led two relatively obscure academics to take action. "But the thing that really got us," says Glynn Custred, an anthropology professor who is one the CCRI sponsors, "was when the state legislature passed a bill that would have mandated quotas—the same proportion as the population of California—for admissions *and* graduation. Thank God, [Gov. Pete] Wilson refused to sign it."

Custred and his cosponsor Thomas Woods are suddenly very popular. Republicans, not surprisingly, have embraced their initiative. More titillating is the flurry of private meetings CCRI sponsors have had with Democrats. There is a possibility the party will shatter over this, splitting the liberal base (minorities, feminists and public employees) and more moderate Democrats. Bill Clinton is suspended in between, his re-election held hostage to this issue, a scenario that is already the subject of nonstop hand-wringing within the White House. "You may be shocked by some of the people who wind up supporting this," says a Democratic member of Congress. "For some, it's political expediency. [But] a lot of us believe these programs just don't work."

The crucial figure may be Willie Brown, the powerful state Assembly leader who is hoping to move over to the state Senate in 1996. Brown is opposed to CCRI, "but Willie has to think about practical politics," says one California Democrat. "If Democrats get wiped out by this he won't control the Senate." Last week Lt. Gov. Gray Davis, the highest-ranking elected Democrat in California, signaled that his position was . . . in transition. "There aren't any sacred cows. We should reexamine every program," he told me. "We know that affirmative action has created problems, abuses we didn't contemplate. But if you eliminate or severely curb . . . then what?"

The "then what" is crucial. The original sin—racism, born of slavery—remains an American outrage. If affirmative action is rejected, there is a need to send an emphatic message of continued inclusion to the black community. But how? One way might be to insist that discrimination be punished severely. There could be serious, high-profile "sting" operations against businesses suspected of bigoted practices. There could also be a symbolic leveling of the playing field from the *top*, the elimination of "legacies"—affirmative action for the academically disadvantaged children of alumni (about 12 percent of all admissions at elite colleges). "I think we should do the opposite," says Ward Connerly, "and give a break to students whose parents *didn't* go to college." Connerly also favors a form of affirmative action by economic status. "Not lower standards," he says, "but outreach, an effort to identify promising youngsters in poor neighborhoods and prepare them to compete in college." There *is* such a program—Upward Bound, which uses student volunteers from 609 different colleges as tutors. The bad news is that it hasn't been very effective: while 88 percent of the Upward Bound students are accepted into college, only 25 percent graduate. The most convincing replacement for affirmative action might be to guarantee a first-rate education for every poor child in America—but that wouldn't come cheap, and it would be money wasted without steady, responsible parental involvement.

In the end, leadership must also come from the president. Affirmative action is likely to end on Bill Clinton's watch. He has a responsibility to make it clear—*now*, before the court cases, before the California referendum beats up—why this policy has failed and what the country must do next to bind the wounds and make sure all doors remain open. He cannot equivocate; his standard mushy two-step will not suffice. There is more at stake here than a presidency. The most basic American idea—that people from all races and religions can coexist as equals—may be on the line. ■

THE FEDERAL PAGE

Locality Pay to Be Reviewed as Budget Issue

By Stephen Barr
Washington Post Staff Writer

Rep. John L. Mica (R-Fla.), chairman of the House civil service subcommittee, said yesterday he plans to conduct a review of federal employee compensation and benefits, including the "locality pay" formulas designed to boost government wages in 27 areas of the nation.

"We're definitely looking at it," Mica said of locality pay, in part as a budget-related issue. But he said he could not predict whether the subcommittee review would be completed in time to make recommendations to House Budget Committee Chairman John R. Kasich (R-Ohio), who intends to present a GOP budget featuring deep spending cuts this spring.

Mica's remarks came during a break in a hearing on the Clinton administration's restructuring of the Office of Personnel Management (OPM). Congressional aides said later that the review grew out of the House Republican search for budget savings and from Mica's desire to conduct oversight hearings on compensation issuea. "It is not our stated intention to cut federal pay in 1996," a GOP staff member said. "But we do want to look at some of the pay-setting mechanisms."

Locality pay—crafted by a Democratic Congress and the Bush administration—is intended to help close the "pay gap" between white-collar federal workers and private-sector employees in areas where nonfederal wages for similar jobs are higher than government pay. During the last two years, Washington area employees received locality raises totaling 5.45 percent.

The locality pay review may not be completed in time for the GOP budget, but "we're definitely looking at it."
—Rep. John L. Mica (R-Fla.)

Formulas setting locality pay rates are based on surveys by the Bureau of Labor Statistics. In its first budget, the Clinton administration contended that the methodology used to calculate locality pay was flawed, in part because of problems in matching federal job descriptions with private-sector counterparts. One internal administration analysis said pay for some federal jobs would end up being too high.

The president's last two budgets have been silent on the issue, but Congress has appropriated money to keep locality pay alive, although not in the amounts needed to match what the Federal Employees Pay Comparability Act requires.

Yesterday's hearing did not delve into federal pay policies, but focused on a proposed reorganization of OPM and the estimated $30 million in budget savings that the Office of Management and Budget expects OPM to generate by "privatizing" its investigations of employees and training offices.

Mica read from letters that he has received from three agencies raising questions about the plan. The Treasury Department, for example, said the proposal "would have a significant adverse impact upon our suitability and security program."

Mica, saying he wanted to ensure that the proposal would save taxpayer dollars, pressed OPM Director James B. King about how the savings would be obtained. King said the questions would be referred to White House budget officials and he noted that agency plans were at an early stage.

But he stressed that OPM has undergone "significant downsizing" since his arrival 22 months ago. OPM's staff has been cut from 6,944 to 5,341 employees, King said, with about 40 percent of the reduction in supervisory and middle management ranks.

Subcommittee members did not seem interested in abolishing OPM—a step some critics have urged—and two witnesses—former OPM directors Constance Horner and Donald Devine—said the government needs a central personnel office to oversee and protect the integrity of the civil service system.

104th CONGRESS: 100-DAY COUNTDOWN

GOP wants affirmative action reviewed on Hill

Clinton administration backs race, gender preference

By Nancy E. Roman
THE WASHINGTON TIMES

Decrying "special rights," Rep. John Boehner, chairman of the Republican Conference, said yesterday both the House and Senate will review affirmative-action laws.

"We are going to look at affirmative action. Has it worked?" asked the Ohio Republican. "Government is to ensure that all Americans have a fair opportunity. ... We shouldn't be giving anyone special rights, special considerations over the rights of other Americans."

Majority Leader Bob Dole, Kansas Republican, expressed similar views Sunday, on the TV news show "Meet the Press."

"Has it had an adverse, a reverse reaction? Why did 62 percent of white males vote Republican in 1994?" Mr. Dole asked. "It's because of things like this, where sometimes the best-qualified person does not get the job because he or she may be one color. And I'm beginning to believe that may not be the way it should be in America."

On Dec. 22, Mr. Dole wrote to Daniel P. Mulhollan, director of the Congressional Research Service, asking for "a comprehensive list of every federal statute, regulation, program and executive order that grants a preference to individuals on the basis of race, sex, national origin, or ethnic background."

Clarkson Hine, Mr. Dole's spokesman, said he is expecting the information later this month, but declined to say what precisely Mr. Dole will do with it.

William Mellor, president of the Institute for Justice, a libertarian think tank that opposes racial preferences, said Mr. Dole's interest adds momentum to civil rights reform.

"Dole is far too experienced a politician to raise the issue of this volatility without serious intent," he said. "There is serious momentum."

Mr. Mellor said that after a briefing last month that highlighted the problems of racial preferences, the institute was contacted by dozens of congressional offices, including Mr. Dole's.

"They ranged from mildly interested to seriously wanting to change policy," he said.

Any legislation or hearings on affirmative action in the Senate would go before the Senate Judiciary Committee, chaired by Orrin Hatch, Utah Republican.

Jeanne Lopatto, press secretary for the committee, said "he is watching," but Mr. Hatch has not scheduled hearings because he is "concentrating on things of higher priority," including the balanced-budget amendment, crime and term limits.

On the House side, things are moving. Last month, two House Republican committee chairmen said they will hold hearings on the Justice Department's civil rights agenda in an effort to redirect the Clinton administration's policies on quotas and racial preferences.

Rep. Bill Goodling, Pennsylvania Republican and chairman of the Economic and Educational Opportunities Committee, said the hearings may lead to amending civil rights laws or drafting new legislation so that race-based firing is no longer permissible.

Rep. Henry J. Hyde III, Illinois Republican and chairman of the House Judiciary Committee, singled out two "disturbing developments" in the Justice Department's enforcement of civil rights:

- The Piscataway, N.J., case in which a white high school business teacher was fired based on her race. Under President Bush, the Justice Department argued that the teacher was unfairly discriminated against based on her race. The Clinton Justice Department reversed that position and now argues that race-based firing is permissible even when the employer has no history of past discrimination.
- The Chevy Chase Bank case, in which the department repudiated the bank for not having enough branches in predominantly black areas. The department imposed an unprecedented quota: It mandated black employees at all levels of the bank's operation, advertisements in black publications and radio stations, and marketing to black real estate agents.

Asked yesterday whether Republicans fear that opposing racial and gender preferences leaves their party vulnerable to charges of bigotry, Mr. Boehner replied: "The Congress is going to look at this, and I also think it's pretty clear that the Supreme Court is going to be looking at this. Because I'm not sure that affirmative action in and of itself would meet the constraints of the Constitution."

• *Laurie Kellman contributed to this report.*

News

Shipbuilding

STEELWORKERS VOTE ON TENTATIVE PACT AT NEWPORT NEWS SHIPBUILDING FACILITY

Members of the United Steelworkers of America were voting Feb. 6 on a tentative agreement with the Newport News Shipbuilding and Dry Dock Co. that would provide the 13,000 production and maintenance workers with three lump-sum bonuses over the life of the 50-month contract.

Voting on the pact, which would replace one that expired Feb. 5, was scheduled to continue until 1 a.m. Feb. 7 at the union hall near the Newport News, Va., shipyard.

The proposed contract calls for a ratification bonus of 5 percent of a year's straight-time wages, followed by a 4 percent bonus in July 1996 and a 3 percent bonus in December 1997.

A managed care health plan would become effective July 1, 1995, that features no deductible, lower copayments and a lower out-of-pocket limit than under the previous plan. About 97 percent of doctors already being used by employees are in the network, which will be administered by Blue Cross, according to John Greenlee, a union staff representative. Benefits would be paid at 90 percent in network and 70 percent out-of-network, he said.

Employees would pay a $10 copayment for office visits. The maximum out-of-pocket expense in-network would be $500 for an individual and $1,000 for a family.

Monthly pension benefits would be raised by $1 to $23 per year of service effective Jan. 1, 1996, with two additional $1 increases over the term, taking the benefit to $25 per month for each year of service.

Life insurance would be increased by $2,000 to $24,000 in February 1995 and by another $2,000 in July 1996. Accidental death and dismemberment benefits would be raised by $3,000 to $15,000.

The contract would add successor language in case the shipyard is sold. Language also would be added providing that the union be informed about shipyard operations including contracting out.

New and expanded seniority protection would be provided, according to the union. In case of layoff, an employee could displace the least senior employee from his/her previous job function when skill and ability are relatively equal.

Beginning next year employees would receive 10 percent less annual leave while new hires would earn annual leave at a slower rate, according to Greenlee. Employees on the payroll prior to Feb. 6 would continue to receive 40 hours of vacation in each of the first and second years. In their third year, vacation would be reduced from 80 hours to 72 hours; in year five it would be reduced from 120 to 108, in year 10 from 160 to 144, and in year 20 from 200 to 180 hours. New hires would receive 40 hours in their first through fourth years, and then they would get the same number of hours as current employees except they would not be effective until their fifth, 10th, 20th, and 30th years, Greenlee said.

A company spokesman declined to comment on the proposed contract pending the outcome of the ratification vote.

Age Discrimination

FORBES' SECRETARY MAY PROCEED WITH AGE BIAS SUIT AGAINST BOSS

A 65-year-old secretary to Malcolm Forbes Jr., who was discharged because of an allegedly bad attitude after her boss became chief executive officer of the company, can proceed with an age discrimination suit against her former employer, a federal judge in New York has ruled (*Barton v. Forbes, Inc.*, DC SNY, 93 Civ. 0994, 1/4/95).

Rejecting a summary judgment motion by Forbes Inc., Judge Peter K. Leisure of the U.S. District Court for the Southern District of New York concluded that alleged statements made by Forbes and two other company officials "may reasonably be understood as reflecting age animus," and were sufficient to allow the claim of former secretary Anne Barton to proceed to trial.

The court conceded that the company had produced evidence that Barton was fired because she had a poor attitude and was not "sufficiently cooperative" to assist Forbes in his new role as CEO of the company following his father's death. But it determined that enough question of fact over the situation existed for the case to stay alive.

Barton was hired as a secretary to Forbes in 1978 and worked for him until August 1991 when, shortly before her 65th birthday, Forbes fired her. Barton alleged that she was fired because of her age in violation of the Age Discrimination in Employment Act and state law. The company asserted that she was fired because she had a bad attitude and was "not sufficiently cooperative to enable

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THE NEW YORK TIMES NATIONAL TUESDAY, FEBRUARY 7, 1995

Backlash Against Affirmative Action Alarms Advocates

By STEVEN A. HOLMES
Special to The New York Times

WASHINGTON, Feb. 6 — For supporters of affirmative action, these are nervous days.

A proposed ballot initiative in California that would ban racial preferences in employment and education enjoys widespread support. Two Federal courts have struck down a University of Maryland scholarship program exclusively for blacks. The Supreme Court will rule this term on the constitutionality of a Federal set-aside program. And leaders of the Republican-controlled Congress are murmuring about taking a hard look at Federal affirmative-action policies.

"There is an uneasiness with the way this issue is being approached," said Theodore M. Shaw, associate director-counsel of the NAACP Legal Defense and Educational Fund Inc.

The jitters among minority and women's groups were heightened over the weekend when Senator Bob Dole of Kansas, the majority leader, said he had asked the Congressional Research Service to compile a list of "all bills that involve preference."

While sidestepping whether he would support the elimination of preferences based on sex or race, Mr. Dole, speaking on Sunday on the NBC News program "Meet the Press," did express reservations about them.

"You know, the people in America now are paying a price for things that were done before they were born," Mr. Dole said. "We did discriminate. We did suppress people. It was wrong. Slavery was wrong. But should future generations have to pay for that?"

Aides to Mr. Dole said that the Senator had made his request to the Congressional Research Service in late December, and that he expected an answer by the end of this month. But Republican leaders in the House and the Senate say that no legislation regarding affirmative action will be considered until both chambers have finished dealing with the provisions of the Contract with America.

"Work is going forward in various legislative pockets, looking at second-wave issues," said Charles J. Cooper, an official in the Justice Department in the Reagan Administration who is advising several Republican lawmakers on civil rights issues. "My sense is that the issue of racial quotas, racial preferences, is very close to the top of the second wave."

The idea of affirmative action being debated in a Republican-dominated Congress with a Presidential election on the horizon is chilling for supporters of affirmative-action programs. During the Bush Administration, backers of a civil rights bill were stymied for nearly two years by former President George Bush's characterization of it as a "quota bill." And that was when both House of Congress were controlled by Democrats historically more sympathetic to affirmative action.

"Certainly the political landscape has changed," Mr. Shaw said. "The prospect of Congress opening up affirmative-action programs for review is one that is a cause for concern. These issues are very complex and sensitive. The courts have struck a balance that allows affirmative action in limited circumstances. But the political process and the nature of political discourse these days do not insure these issues will be dealt with in a thoughtful and sensitive way."

With the issue bubbling just below the surface, the White House has established an informal working group to monitor developments and to coordinate the Administration's response, said a senior White House official who spoke on condition of anonymity.

The official emphasized that the group was not "coming up with a new position" for the President, who has supported affirmative action.

Looming above all political calculations in the debate over affirmative action is the proposed California ballot initiative that would bar the use of ethnicity or sex as "a criterion for either discriminating against, or granting preferential treatment to, any individual or group."

Backers of the measure are seeking enough signatures to place it on the ballot with the state's Presidential primary in March 1996. Should they succeed, the issue of affirmative action would probably move to center stage during the Presidential campaign.

Indeed, some Republicans see the issue as one they can use to peel away even more white men from the Democratic Party in next year's general election. They believe that former President Bush lost a major re-election campaign issue when he signed the civil rights measure that he had earlier derided as a "quota bill." The measure overturned several Supreme Court decisions that had made it harder for members of minorities and for women to win job-discrimination suits.

An issue that one Republican adviser confidently sees as 'no lose.'

Now, several Republicans are eager to approve anti-affirmative-action measures and to dare the President to veto it. If he does, they are confident he will lose support among white men. If he signs it, on the other hand, his support among black voters and liberals will be jeopardized.

"In my view it's a no-lose proposition for Republicans," Mr. Cooper said.

Some civil rights leaders confidently say that attacks on affirmative action are nothing new and that such attacks have been beaten back in the past with support from Democrats and Republicans alike.

Civil rights advocates say they hope to mount a large-scale public education campaign to counter what they consider are the myths of affirmative action. Ralph Neas, the executive director of the Leadership Conference on Civil Rights, said: "What we have to make sure of is that everyone has all the facts; to explain why affirmative action is needed, needed, how well it has worked, and how it has benefited all Americans."

And while some acknowledge an uphill battle, there are signs that the public is ambivalent about current policy. For example, in a nationwide survey of 1,353 people by The Los Angeles Times last month, 73 percent said they favored a Federal law that would "make it unlawful for any employer to grant preferential treatment in hiring" to any group or person based on race, sex or national origin.

In the same poll, however, people were asked whether "affirmative action programs designed to help minorities get better jobs and education go too far these days, or don't go far enough, or are just about adequate." When phrased that way, 39 percent said the programs went too far, 23 percent said not far enough, and 32 percent said they were adequate. The rest said they did not know.

Affirmative action to get review from Republicans

By Bob Minzesheimer
USA TODAY

Republicans are asking whether affirmative action discriminates against white males.

The issue wasn't mentioned in House Republicans' 10 campaign goals, but now they're planning hearings, as early as March, on whether federal laws requiring affirmative action in hiring should be repealed.

And a private group, with GOP aid, is drafting a bill to ban racial and gender preferences to make up for discrimination.

As House GOP Conference Chairman John Buehner of Ohio put it Monday: "Government's role is to be sure all Americans have a fair opportunity, and shouldn't be giving anyone special rights."

The issue is hot nationally since the elections, in which the anger of white males was identified as the reason for the Democrats' loss of Congress.

An initative in California would overturn programs giving minorities and women preference in college admissions, jobs and government contracts.

And the Supreme Court, which has shown unease with race-conscious policies, is preparing to rule in the case of a Colorado contractor who says he lost a federal road contract because he's white.

> "The people in America now are paying a price for things that were done before they were born. We did discriminate ... But should future generations have to pay for that?"
>
> —Senate Majority Leader Bob Dole, R-Kan.

Senate Majority Leader Bob Dole says affirmative action has had "a reverse reaction."

He says the GOP will look at policies using preferences: "The people in America now are paying a price for things that were done before they were born. We did discriminate. ... But should future generations have to pay for that?"

House Judiciary Committee Chairman Henry Hyde, R-Ill., has criticized the Justice Department for using "racial quotas" to settle complaints of discrimination and going beyond congressional intent.

But Rep. John Conyers of Michigan, the Judiciary Committee's ranking Democrat, says critics are "falsely assuming that anyone who gets a job through affirmative action is less qualified."

He says that "well-constructed affirmative action programs, narrowly tailored to remedy past discrimination, have been very successful in cases like police and fire departments and breaking down discrimination against women."

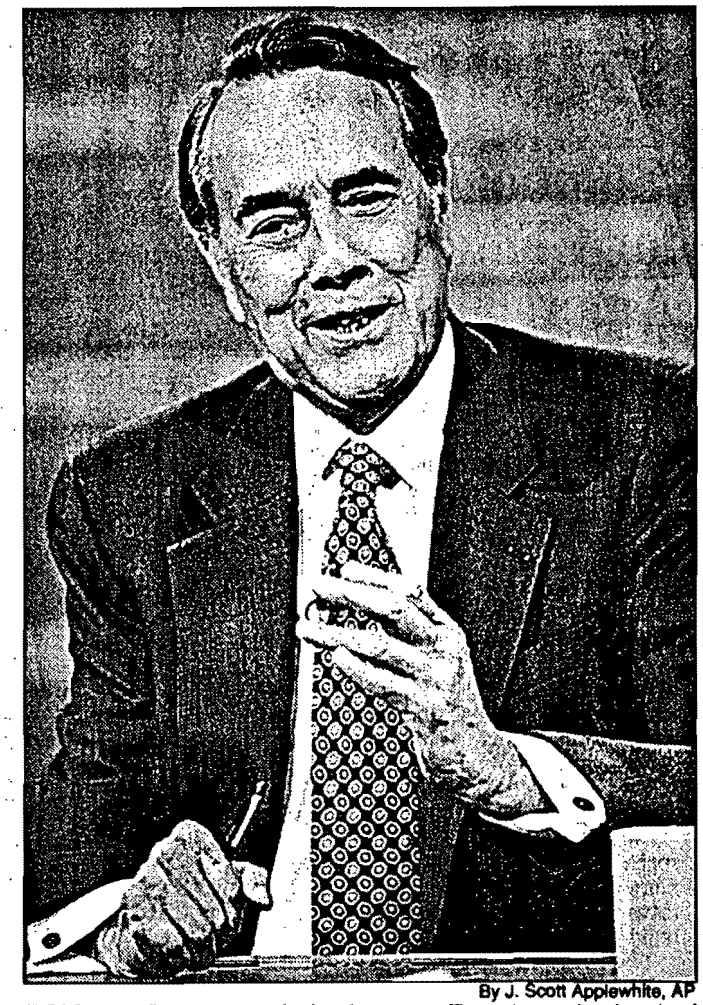
Critics such as William Mellor, president of the libertarian Institute for Justice, argue that most benefits go to educated, middle-income minorities.

"It helps those who need it the least," Mellor says. "For those in the inner city, it's at best useless and at worst creates a climate of hostility from other workers."

Mellor says that if Republicans are to "regain the moral high ground" on civil rights, "it's not enough to be against something. You've got to have a positive alternative ... a new civil rights that looks at all government-created barriers to individual opportunity."

Mellor's group is drafting a bill redefining affirmative action to cases of individuals — not to members of groups.

William Taylor, director of the Citizens Commission on Civil Rights, says he'd welcome "fair hearings" that could demonstrate the benefits of affirmative action but fears "people will seek to use the issue for crass political advantage."



By J. Scott Applewhite, AP

DOLE: The Senate majority leader says affirmative action has had 'a reverse reaction,' and the GOP will review the policies.

Chipping at a Democratic Cornerstone

California Party Leaders Consider Compromise on Affirmative Action

By William Claiborne
Washington Post Staff Writer

LOS ANGELES, Feb. 3—California's top Democrats are looking for ways to accommodate a proposed ballot initiative in 1996 that would repeal all state laws on affirmative action, a cornerstone of the party's social policies for three decades.

Mindful of the electoral hammering they suffered last November, the Democrats say it would be political suicide not to compromise in the face of increasingly popular Republican attacks on affirmative action as "reverse discrimination" against whites and males.

Above all, party leaders are seeking to avoid a repeat of last fall when voters overwhelmingly approved Proposition 187, which would deny many social services to illegal immigrants. Many Democrats who opposed the initiative, which is now bottlenecked in court appeals, went down to defeat, including gubernatorial candidate Kathleen Brown.

"This could become Armageddon. It's potentially worse than Proposition 187, much more divisive, really. It will turn neighbor against neighbor and brother against brother," said state Democratic chairman Bill Press.

Affirmative action is one of a number of cutting-edge national issues—such as crime control, welfare reform and devolution of power to the states—that Democratic strategists here argue the party must reconsider. Some contend the party cannot afford to cling to outmoded positions or to relinquish to Republicans the support of white middle- and working-class voters who lean rightward on these issues.

Sponsored by two conservative San Francisco-area scholars, the proposed California Civil Rights Initiative would amend the state constitution to prohibit state and local governments from giving preference to women and minorities in jobs, promotions, contracts and college admissions. It has been endorsed by

See AFFIRMATIVE ACTION, A6, Col. 1

DOLE, From A1

where sometimes the best-qualified person does not get the job because he or she may be one color. And I'm beginning to believe that may not be the way it should be in America."

"We did discriminate. We did suppress people. It was wrong. Slavery was wrong. But should future generations have to pay for that? Some would say yes. I think it's a tough question," Dole said.

In California, conservatives who are angry about "reverse discrimination" against whites and men are pressing for a ballot initiative that would eliminate all affirmative action requirements in state law. A Senate Republican review of the issue could intensify the national debate about affirmative action requirements.

The Supreme Court has had a mixed view of affirmative action, knocking down some state law preferences but giving special deference to preferences in federal law. Now the court, which has become more conservative in recent years, is taking up a challenge to a federal law that gives preference to socially disadvantaged people, including racial minorities.

On another subject, Dole and Sen. Trent Lott (R-Miss.), the majority whip, predicted that Henry Foster Jr., President Clinton's nominee for surgeon general, will face difficulty winning confirmation because he performed abortions.

Dole said Foster, an obstetrician-gynecologist, had "done a lot of good things" about teenage pregnancy. But he added, "I don't like what I hear, what I read" about the nominee. Dole said he was unhappy that the White House did not tell Congress earlier that Foster had conducted abortions. The nominee said he performed fewer than a dozen abortions in addition to delivering more than 10,000 babies.

Dole declined to say how he would vote, explaining that "we shouldn't shoot down somebody before they've even had a hearing."

In an example of how the confirmation is shaping up as a major battle between groups on each side of the abortion issue, the National Abortion and Reproductive Rights Action League announced yesterday that it was launching a major campaign supporting Foster in order to "prevent opponents of choice from isolating and demonizing doctors" who perform abortions, Reuter reported.

Antiabortion groups are flooding Senate offices with calls urging lawmakers to vote against the nomination. The Catholic archbishop of Washington, Cardinal James A. Hickey, Saturday called Foster's nomination disappointing on grounds that he did not represent a "change in direction" from Joycelyn Elders, whom Clinton fired in December.

Meanwhile, Dole, Lott and House Appropriations Committee Chairman Bob Livingston (R-La.) each said yesterday that they might support the Clinton administration's proposal to increase the minimum wage in exchange for a cut in taxes on capital gains.

Council of Economic Advisers Chairman Laura D'Andrea Tyson declined on CBS's "Face the Nation" to say how the White House would react to linking the two issues, but she reiterated the administration's prediction that three-quarters of the extra income from the tax cut would flow only to the wealthiest 10 percent of the population.

WASH. POST 2/4

Showdown Looms on Court Bias Study

GOP-Appointed Judges Question Project's Methodology and Goal

By Toni Locy
Washington Post Staff Writer

Republican-appointed federal judges in the District are headed for a showdown with a task force on gender, race and ethnic bias over its two recently completed studies of people's perceptions of their courthouse experiences.

The studies—one on gender and the other on race and ethnic bias—found room for improvement based on responses from female and minority lawyers and employees, who reported that they sometimes feel like second-class citizens when they come to court.

The studies, based on questionnaires and focus groups, found that women and minorities lag behind white men in many prestigious areas of courthouse life. They are not invited as often as white men to be on court committees or attend court meetings. They rarely are appointed as special masters in complicated court cases, and of 15 independent counsels appointed, only one has been a woman.

Sometimes, the studies said, women and minorities perceived that they were ignored by judges and other lawyers when they raised objections or made arguments. Occasionally, they were asked whether they were lawyers, even if they were seated next to a defendant at counsel's table. Some women said they felt they were penalized for trying to be as aggressive as men, and a small percentage of minorities said they felt as if they must prove that they are competent to be in court.

But overall, the draft reports concluded that the courts have come a long way since 1872, when Charlotte Ray became both the first female member of the District bar and the first African American woman to practice law in the country.

"Maybe . . . our perceptions are wrong and their perceptions are wrong, [but] the problem is there *are* those perceptions, and until you can deal with those, you know we're going to stay in the same place we are," said a female African American lawyer who was interviewed for one of the studies.

The task force of five judges was commissioned in 1990 by the Judicial Council, which consists of seven appellate judges and six trial court judges. The studies, conducted by two task-force committees, are the first of their kind to be launched by federal judges to examine the courthouse environment, from lawyers and witnesses to clerks and spectators. They are especially distinctive because they focused on how people feel when they walk into the courthouse.

For that reason, the studies have put the task force on a collision course with conservative members of the U.S. Court of Appeals who will lead the opposition when the Judicial Council meets in late March to vote on accepting the reports and their recommendations.

The Republican-appointed judges, who make up a majority of the appellate court here, gave notice a year ago that they will challenge the task force's conclusions. Before the studies were finished, they gave the task force a vote of no confidence last year, taking issue with the goal of the studies and their methodology. They said they were concerned that the groups deliberately set out to reach a certain political conclusion by loading focus groups with like-minded lawyers.

The judges said some of the areas reviewed—such as how law firms assigned cases to their lawyers—were outside the control of the courts, and others came too close to home. They adamantly opposed any examination of their hiring practices of law clerks, calling it an affront to their independence, even though the interns are paid by taxpayers.

According to the gender portion of the studies, women have held 51 percent of the law clerk positions on the district court. But on the appellate court, men have held 76 percent of the law clerkships. Only a few minorities, mostly African Americans, have held the clerkships over the years. Latinos lag behind, as well.

Anita K. Blair, president of the Independent Women's Forum, a nonprofit, nonpartisan organization, stopped short of saying the studies were a waste of time. She said her group is concerned that the studies could alarm the public unnecessarily by calling attention to minor problems. "It would worry people that something might be going on, that the fix might be in," she said.

The committee also recommended that the court overhaul its equal employment opportunity and grievance procedures, create a sexual harassment policy and establish an ad hoc committee to oversee implementation of its suggestions. The race and ethnic bias committee recommended that signs in Spanish and English be placed in the courthouse to help visitors.

Both studies revealed only anecdotal stories about life in the courthouse. One unnamed judge allegedly touched a female lawyer's knee and another embraced and kissed a female clerical employee. But, for the most part, both reports described a courthouse where women and minorities usually are treated with respect.

Vicki Jackson, a Georgetown University law professor who was co-chairman of the gender committee, defended her group's focus on perceptions. "In order to do justice and function well, the judicial system needs to be perceived as behaving fairly toward everyone," she said.

The task force committees eventually agreed with the conservative judges and Blair's group that some issues were beyond the reach of the courts. But the committees stressed that the District's federal court—the only one in the nation that sits entirely in an urban area where minorities are a majority—must be held to a high standard of fairness because of its position, second only to the U.S. Supreme Court in importance.

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California Democrats Seek to Accommodate Initiative Against Affirmative Action

AFFIRMATIVE ACTION, From A1

the state Republican Party and its backers predict they will easily get the 615,000 valid signatures needed to qualify for the 1996 ballot.

But Press said state Democrats do not want to stage an ideological showdown over the issue. "Not only is this an area where there's a possibility of compromise, we have to be aggressive in seeking a compromise in order to avoid a bloodbath in 1996," he said.

"I say that as a longtime supporter of affirmative action. But like a lot of good programs, it can be abused by people with the best intentions. There are cases where people can point to where it's been discriminatory. If it's broke, I think we've got to fix it," Press added.

Lt. Gov. Gray Davis, who since being elected in November has emerged as the Democratic Party's policy point man, told reporters at a breakfast meeting this week, "There shouldn't be any sacred cows in public policy and all of us should have the courage to reexamine policies, no matter how noble, to make sure they're still wanted."

In a later interview, Davis added that Democrats have to assume the initiative will be on the ballot in 1996 and will be popular, and that they should "take stock of the beating we got last time and collectively search for a message that resonates with the voters but is still accepted by our supporters."

Noting that California is "more conservative than people appreciate," Davis, a onetime aide to former governor Edmund G. "Jerry" Brown Jr. (D), said Republicans have been adept at promoting "wedge" issues in ballot initiatives that have spilled over into electoral defeats for Democrats—including Proposition 187 last year, welfare reform in 1992 and term limits in 1990.

Press said that although the party leadership will hold a series of meetings to devise an affirmative action strategy, one possibility is a counter ballot initiative that would allow remedies to discrimination based more on "socioeconomic considerations" than race, ethnicity and gender. Such a policy would be consistent with the way academic scholarships traditionally have been granted, he said.

Press said he would prefer to revise affirmative action in the state legislature, but, "If it has to go to the ballot . . . we'll have our own ballot initiative." He said the party would favor a vote on the proposition in the March presidential primary, when the two parties would not be going head-to-head.

Gov. Pete Wilson (R) has not yet taken a position on the ballot initiative, according to spokeswoman Leslie Goodman. But in a recent television panel interview show, Wilson said, "I don't think we should be awarding either jobs or places in a graduate school class based upon race or gender, because if you do, essentially you're talking about a quota system, and I don't think that what we want are quotas. We don't want to deny anybody access, but I don't think you give preferences by virtue of gender or membership in an ethnic group."

Because California is a bellwether of political and social change nationally, backers of the movement against affirmative action say the ballot initiative could have wide repercussions.

"I'm not surprised Gray Davis made that move. I think it will split the Democratic Party and you're going to see plenty of people jumping on the bandwagon all across the country," said David Horowitz, president of the conservative, Los Angeles-based Center for the Study of Popular Culture. "People are no longer intimidated by the charge of racism, because it's been so overused and trivialized."

Horowitz, a onetime New Left radical who coauthored "Destructive Generation: Second Thoughts About the 1960s," said that in the wake of the Republican revolution in November, "the dam has burst" in public attitudes against existing affirmative action laws.

William L. Taylor, vice chairman of the Washington-based Citizens Commission on Civil Rights, who supports affirmative action, said he was not surprised at the Democrats' steps to accommodate the repeal movement. "After November, there are people in various stages of shell shock. Politicians are concerned about what kind of hit they'll take on this one," said Taylor.

Officer Awarded $750,000 in Va. Retaliation Suit

By Bill Miller
Washington Post Staff Writer

A Prince William County police officer was awarded $750,000 yesterday by a jury that found her top supervisors had retaliated against her after she filed complaints alleging racial and sexual discrimination.

Janice E. Hetzel, 36, a native of Puerto Rico, said she was denied promotion to sergeant and targeted for disciplinary action because of her complaints of mistreatment at work. Among other things, she cited an internal investigation begun against her just one week before her case went to trial in U.S. District Court in Alexandria.

The ruling was a setback for Police Chief Charlie T. Deane, who has led the 300-member force since 1988. Deane, who was a defendant in the suit, testified that Hetzel lacked the skills needed to be a supervisor and that she was not subjected to unfair scrutiny by her supervisors.

The jury found that Hetzel was not a victim of discrimination but that she had faced retaliation. The verdict came after a two-week trial that Judge Leonie M. Brinkema called "a sad case with some troubling issues."

"I hope this sends a very strong message," said Elaine C. Bredehoft, Hetzel's lawyer. "All of the police officers want a system that's fair. They don't believe they have that now. They need a lot of changes, and they need a lot of reforms. There are a lot of very unhappy police officers."

Hetzel, who wept when the verdict was read, declined to comment as she left the courthouse. The eight-year veteran has remained on duty as a patrol officer throughout the dispute and intends to stay on the force.

Two immediate supervisors and several coworkers testified on Hetzel's behalf, describing her as an outstanding officer. She was named the department's Officer of the Month four times for heroic conduct.

Prince William County Attorney Sharon E. Pandak said she was "baffled" by the jury's decision and will consider an appeal. "This police department is known as being a very warm and caring department," she said, adding that the alleged instances of discrimination and retaliation did not occur.

Hetzel testified that she was criticized by squad members for defending minority group members on the force, was temporarily denied training for a key assignment and repeatedly singled out for reprimands.

In two days of testimony, Hetzel said her problems escalated in 1989 when she was questioned during an internal affairs investigation triggered by another officer's complaints of racism. Hetzel maintained that she was punished by Deane and others because she backed up the officer.

In 1993, Hetzel filed her own charges of discrimination with the Prince William County Human Rights Commission and the federal Equal Employment Opportunity Commission. She filed her lawsuit in July. After that, she contended, Deane and other supervisors retaliated by singling her out for discipline.

She said the most recent instance took place a week before the trial, when Deane authorized an internal investigation stemming from Hetzel's work on a child sex abuse case that unfolded in November 1993. Although the case ended with a guilty plea, Hetzel was accused of mishandling the suspect's confession when she acted as an interpreter for detectives. Hetzel denied making any mistakes. Jurors later said they questioned the timing of the probe.

GOP Senators Begin Studying Repeal of Affirmative Action

By R. Jeffrey Smith
Washington Post Staff Writer

Senate Republican lawmakers have begun to study whether affirmative action requirements in federal laws should be dropped on grounds that they may discriminate unfairly against white men, Majority Leader Robert J. Dole (R-Kan.) said yesterday.

Dole, appearing on NBC's "Meet the Press," said he has asked the Congressional Research Service to supply him with copies of all federal legislation that promotes affirmative action, or the use of racially oriented hiring preferences to help minorities improve their economic status.

Dole said his voting record gives him credibility in looking at affirmative action. He said he was unsure whether those who want a job or a raise should "have to pay" for the workplace legacy of slavery or for discrimination practiced by generations "before they were born." "It's something we're looking at," he said.

"Has it worked? Has it had an adverse, a reverse reaction? Why did 62 percent of white males vote Republican in 1994?" Dole asked. "I think it's because of things like this,

See DOLE, A5, Col. 1

Cont'd
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/ MONDAY, FEBRUARY 6, 1995 ★
The Washington Times
FEDERAL REPORT

Forest Service hit for 'quota lunacy'

Herger plans bill to end excesses

By Ruth Larson
THE WASHINGTON TIMES

Rep. Wally Herger has labeled the U.S. Forest Service's diversity programs "quota lunacy" and "ridiculous excesses of a bureaucracy run amok," and he says he will introduce legislation to end policy and hiring excesses.

The California Republican has criticized the Forest Service for job announcements that, in an effort to attract more women to certain posts, specify that "unqualified" people should apply.

In a separate issue, national forest officials in Mr. Herger's district have denied permits to same-sex trail rider groups, saying they discriminate against members of the opposite sex.

Mr. Herger fears the Forest Service's hiring policies are endangering the lives and property of constituents who live near national forests.

An internal Forest Service document indicates that, in some cases, critical firefighting positions were left vacant or filled with unqualified temporary workers because no women applied for the posts.

In a letter to Forest Service Chief Jack Ward Thomas, Mr. Herger said many of his Forest Service constituents had complained about the affirmative-action policy, "which they (and I) view as nothing more than reverse discrimination."

"I am astonished that this kind of ideological litmus test is being imposed on American citizens," the letter said.

Mr. Herger said House Judiciary Committee Chairman Henry J. Hyde, Illinois Republican, plans hearings on quotas and affirmative action in mid-April.

Mr. Thomas defended his agency's policy of reserving positions for "unqualified applicants." "On its face, this seems bizarre. However, the intent — if not the choice of language — was appropriate to the circumstances that existed several years ago," he wrote Mr. Herger.

The Forest Service's Pacific Southwest Region had been under a court-ordered consent decree to increase the number of women in its work force. In response, the region created "upward mobility positions," designed to give job opportunities to individuals with the ability, but not the formal training, for certain positions.

The consent decree was lifted in 1992, and Mr. Thomas said the practice was no longer in use. But Mr. Herger promptly produced a current position announcement for a fire-prevention technician, soliciting applications between now and Feb. 21. It stipulates, "Only applicants who do not meet the [Office of Personnel Management] qualifications requirements will be considered."

Mr. Herger said: "It is not a civil right to land a job for which one is unqualified. This is ridiculous."

While the sparring continues over diversity hiring, a new controversy has arisen. A group of men called the Modoc Tribe Riders has been holding an annual four-day horseback ride in the Modoc National Forest since 1941.

But they were denied a permit in 1994 because they failed to invite women to participate.

"Are we no longer able to organize and participate in recreational activities of our own choice?" asked George Walker, a member of the Tribe Riders, in a letter to Mr. Herger. "Is the use of federal lands subject to 'political correctness' [or] the whims of employees who wish to promote a 'feminist agenda' while being paid by the taxpayer[?]"

Modoc National Forest Supervisor Diane K. Henderson wrote Mr. Herger: "I assure you there is no 'feminist agenda' . . . nor do I believe that our federal laws are unfair or intrusive. Rather, our regulations and laws are an attempt to eliminate discrimination practices on federal land."

A group of female riders, the Better Half Ride, has also complained of being denied permits unless men were invited along.

Mr. Herger again wrote Mr. Thomas, saying, "Frankly, if Forest Service employees are spending their time monitoring the gender composition of social events that take place on National Forest lands, then someone has too much time on his (or her) hands."

HEADLINE Body Shop sued over harassment memo; Former manager says she was fired for internal memo
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Origin: NEW YORK (Copyright The Ottawa Citizen)

--- Body Shop sued over harassment memo; Former manager says she was fired for internal memo ---

NEW YORK (Reuter) -- The Body Shop, the cosmetic retailer that promotes its high ethics and refusal to test products on animals, was sued Monday by a former manager.

She alleges she was fired for writing an internal memo saying there were cases of sexual harassment within the company.

Dana Longstreet, who had been creative services manager in New York until she was fired in March 1994, sued the U.S. subsidiary of the British retailer in Manhattan federal court.

The Body Shop, which has more than 1,000 stores in 45 countries, has built its reputation on its natural products and its environmentally friendly approach.

The company says it does not test products on animals.

It came under fire last year after some ''ethical'' investment funds soured on the company and press reports questioned Body Shop's ''green'' credentials.

The suit, which alleges the company acted with malice in taking retaliatory actions against Longstreet, seeks unspecified damages.

A company spokesman did not have an immediate comment.

Longstreet had been the creative services manager until she was fired last March.

In 1993, at the request of her supervisor, she drafted a memo about issues relating to personnel and morale, the suit alleged.

Longstreet alleged she had been told by other women employees about incidents of sexual harassment.

She also attended a meeting with an outside consultant when other employees discussed these incidents, the suit said.

In her memo, Longstreet said sexual harassment was a problem throughout the company and women were afraid to come forward.

She suggested the Body Shop provide training to educate management and employees.

The memo was reviewed, approved by her supervisor and then circulated to senior management in August 1993.

The founder and managing director of the Body Shop, Anita Roddick, requested the memo be faxed to her office in London.

Longstreet was later asked to provide evidence about the harassment but she would not disclose the names of the employees because they had spoken in confidence.

The suit alleged David Edward, president and chief executive of the U.S. unit, told Longstreet she should not have written the memo and would face disciplinary actions if she took similar action in the future.

Roddick also sent Longstreet a fax that allegedly dismissed her concerns.

In January 1994, when Longstreet filed a complaint with the Equal Employment Opportunity Commission, she was notified she would be fired as of March 15, 1994.

The New York Times

DATE: 2-14-9
PAGE: A10

Georgia Superintendent Battles a Subtle Racism

Special to The New York Times

EDISON, Ga. — During his 20 years teaching English at Calhoun County High School here, Corkin Cherubini gradually concluded that black students, regardless of ability, were being steered into lower-level classes. But he said nothing for fear of losing his job.

In 1992, he won election as superintendent of schools in this rural southwest Georgia county, and Dr. Cherubini broke his silence. He called in the Federal Education Department last year to investigate whether the 1,200-student Calhoun County system, which is 70 percent black, was grouping students by race rather than class performance, a practice known as racial tracking.

"I realized I needed help," Dr. Cherubini said. "I saw the futility of one person trying to correct a long-standing tradition."

For stirring the waters, Dr. Cherubini, a soft-spoken white man of 50 and a self-proclaimed outsider in this county of peanut and cotton farms and only 5,700 people, has become the target of bomb threats, hate letters and oral taunts from white parents and students.

Some white families have been angry enough to leave the district.

"Since school started, we've lost 85 students, predominantly white," said Frank Miller, a white member of the school board. "They're just abandoning the school. Before it's all over, we're probably going to lose some more. When you lose white kids, when you lose their families' support, it's going to hurt the school system."

But Dr. Cherubini is resolute. "Racial tracking is not much more than segregation," he said.

Under the district's system, students were placed in classes ranked A, B, C and D. The A classes were unofficially considered the college preparatory classes and tended to get the more experienced teachers and more money, Dr. Cherubini said. The D classes were considered the vocational track. The problem, he said, was that the elite classes were largely white and the lower-level classes entirely black.

Students could petition to move to a higher level, but by the seventh or eighth grade, their track was pretty well determined. "One of the biggest things is that the kids know where they are," he said.

Dr. Cherubini also asked Federal officials to investigate the cheerleading squads, which for years were made up of white girls for football, black girls for basketball.

"The white cheerleading squad received 30 times more money than the black cheerleaders," Dr. Cherubini said. "They could go to camp, learn all the new moves, have newer uniforms."

Last November, the Education Department's Office of Civil Rights and Miami Equity Associates, a federally financed civil rights organization, concluded that blacks were indeed being placed by race instead of test scores, grades or teacher evaluations, a violation of the Civil Rights Act of 1964.

Working with the Federal officials, the district decided to abandon the four-tier classification. To make the schools more equitable for black students, the Education Department will provide money to send teachers to conferences about how to end racial tracking and to bring in teachers and principals from other school districts for counsel. The investigators also ordered the integration of the cheerleading squads.

Although many white parents are angry, Nancy Peck of Miami Equity Associates asserted that by asking for help before the Government came in uninvited, which she said was inevitable, Dr. Cherubini made it much easier for his schools.

"I think it was an extremely courageous thing for Cherubini to do," she said.

Racial tracking, Dr. Peck said, is all too common, particularly in Southern districts where the administrators are white and at least half of the student body is black. She said the elite, majority white classes are sometimes consciously created to prevent white flight. More often, she said, the imbalance results from white parents' clamoring to get their children in the best classes and the mistaken feeling that black students are not as smart.

Black parents had known of the tracking for many years, said Willie Taylor, vice chairman of the Calhoun County School Board and the first black person elected to the board. "But every time a black parent would go over to the school and ask to have their child moved up to a higher level, they would always tell them that there was no room in the class," Mr. Taylor said. "It was kind of like sweeping it under the rug."

Until a few years ago, many blacks worked on the farms and in the houses of white residents, said James Gibson, a former member of the school board who is black. If those blacks had complained about the inequitable class breakdown, they would have lost their jobs.

Dr. Cherubini, too, said that as a new teacher at Calhoun County High in the early 1970's he felt great pressure not to upset the status quo.

"Being elected superintendent, to actually be able to do something, allowed me to say something," he said.

Dr. Cherubini said he also believed that his status as an outsider enabled him to speak out. Reared in New Jersey and Massachusetts, he is not a member of the local Lions Club, attends a Unitarian Church in Tallahassee, Fla., and has a name that looks as out of place as a skyscraper would in downtown Edison.

"I've never fit in real well here with the cliques and the church groups," he said.

Some of Dr. Cherubini's critics said his motives were purely political, that he wanted the school board, which has a black majority, to appoint him for another term in 1996 when Georgia law does away with elected superintendents.

Dr. Cherubini said people are just angry about the changes. "There will be plenty of resistance," he said. "But we are definitely going to come into compliance, whatever it takes."

At a recent pep rally in the high school gym, the newly integrated cheerleading squad led the restless student body in supporting the basketball team. But Dr. Cherubini sat in his office, 10 miles to the east in the county seat of Morgan. He said he was unwilling to deal with potential taunts from white students as they boarded buses or revved up their cars for after-school cruising.

Mamie Williams, a high school teacher and the cheerleaders' sponsor, said she believed it was for the best that the racial tracking was brought to light. "If Cherubini hadn't acted," she said, "it would have never happened."

The Washington Times

DATE: 2-14-95
PAGE: A20

Affirmative action on the table

White House Chief of Staff Leon Panetta perfectly encapsulated Sunday the liberal anxiety over the debate on racial preferences in hiring, contracting, etc.: "I think the worst thing that could happen is you take an issue like affirmative action or the whole issue of civil rights and race relations in this country and make it a political issue. We cannot allow it to happen."

The statement came in response to a growing chorus of voices publicly questioning the wisdom and justice of what Mr. Panetta likes to call "affirmative action," but which many Americans know as a widespread system of race-based preferential treatment. Senate Majority Leader and presidential aspirant Bob Dole brought the issue of racial preferences and reverse discrimination up only the previous Sunday. Sen. Phil Gramm, another presidential contender, has suggested that an end to racial preference schemes may be a feature of his campaign. In California, a ballot proposition is in the works that would end minority set-asides and other forms of racial preference by the state government.

The "we" in Mr. Panetta's "We-cannot-allow-it-to-happen" consists of defenders of the status quo on affirmative action. Their worries are genuine. Public sentiment is strongly opposed to current doctrine and practice on preferential treatment based on race, gender or national origin. Mr. Panetta and Co. understand perfectly well that they are on the wrong side of popular opinion on the issue. Only by keeping it off the table — i.e., by suppressing it as a political issue — have they managed to avoid paying much of a political price for their views.

The suppression has often taken the form of charges of divisiveness and racism leveled at those who question racial preference schemes. And fear is, in fact, a powerful motivator.

But it's not what it used to be. Many people who are obviously not racists have been called racist by now, and the accusation has correspondingly lost some of its sting. Moreover, Americans' essential repugnance at a racial spoils system — special rights or privileges because of membership in a particular group — has only mounted as such programs have become more pervasive and as such phenomena as political correctness on campus have received more scrutiny.

Critical mass for a rethinking of this issue probably came Nov. 8 — as it did for so many other of the givens of the modern liberal welfare state. "We cannot allow it to happen"? It is happening, Mr. Panetta.

The Washington Times
★ WEDNESDAY, FEBRUARY 15, 1995

Letters

What's at stake in Dr. Foster's nomination

In your Feb. 8 Page One article "Foster abortion-pill work puts confirmation in deeper doubt," Rep. Sheila Jackson Lee, Texas Democrat, was quoted as saying that Dr. Henry W. Foster Jr. is "having his character assassinated without a trial" and that "[t]his is not the time for a 1995 lynching."

Well, then what *is* the time for a "lynching"? Is it only when a pro-life person is nominated? Such as Clarence Thomas, for instance. Now, there's a guy who knows what it's like to be "assassinated without a trial."

As for Dr. Foster, his character is not being "assassinated," it is merely being tested. And so far, it's not holding up to scrutiny.

JANICE L. SCHELL
Sterling

■

Comments in your Feb. 7 news article regarding Dr. Henry W. Foster Jr.'s nomination for the surgeon general post illustrate two common fallacies of pro-abortion advocates ("Critics of Dr. Foster look beyond abortions," Page One).

The first fallacy is that a majority of Americans support a "right" to an abortion at any time for any reason; the second is that only pro-abortion advocates should express an opinion in a "pluralistic democracy."

Your article quotes Kate Michelman, president of the National Abortion and Reproductive Rights Action League, as saying, "This is just another effort at intimidation by a radical minority that wants to deny American women their right to choose." On the contrary, a recent Barna survey shows that only few support Ms. Michalman's idea of "right to choose." The majority support positions from "no abortion for any reason" to "in cases of rape or incest." Accordingly, "radical" would more accurately define *her* position.

Ms. Michelman continues, "This anti-choice McCarthyism is abhorrent and has absolutely no place in our pluralistic democracy." Really? How does she define "pluralistic"? The left typically sees any opposing view as inappropriate to be mentioned in a public forum. And classifying a senator's expressing concerns as "McCarthyism" is last-gasp, inflammatory rhetoric from a faction that is losing ground.

MARC SOULES
Herndon

■

You'd need a team of forensic experts to glean the facts from Cal Thomas' mendacious diatribe against Dr. Henry W. Foster Jr., President Clinton's nominee for U.S. surgeon general ("Reincarnation . . . and obfuscation?" Commentary, Feb. 8). Extremist ideologues such as Mr. Thomas are trying to label the views and philosophy of Dr. Foster as being on the fringe, when in fact they fall squarely into the American mainstream.

Dr. Foster, a highly respected physician, stands with the vast majority of Americans in recognizing that teen-agers make responsible decisions about relationships and sexuality when they have access to the facts.

Contrary to Mr. Thomas' assertions, Dr. Foster's comprehensive approach to the prevention of teen-age pregnancy has turned young lives around for the better precisely because he helps teen-agers confront reality. That's why Dr. Foster's "I Have a Future" program, with its emphasis on job skills, sexual responsibility, education and self-control, was awarded a "Point of Light" by President Bush. Would Mr. Thomas characterize the former president as someone who condones behavior "detrimental to society"?

Mr. Thomas' attack on Planned Parenthood is equally misinformed. Each year, in nearly 1,000 health centers nationwide, Planned Parenthood helps women avert half a million unintended pregnancies that otherwise would result in abortion or unwanted birth. Our educators, counselors and health care providers talk to teens and listen to them about what works in their lives. Condom phobics such as Mr. Thomas are not protecting teens so much as enslaving them to ignorance.

It is the "Just Stay Ignorant" strategy that Mr. Thomas advocates that has failed to stem the tide of teen-age pregnancy in this country. Planned Parenthood will not allow a small group of extremists to dictate American health policy and endanger the future of the nation's children. That's why Planned Parenthood strongly supports Dr. Foster.

PAMELA J. MARALDO, Ph.D., R.N.
President
Planned Parenthood Federation of America Inc.
New York

■

Once again, the leading baby-killing organization in America, Planned Parenthood, has reached into its bag of well-groomed proselytes and selected an outstanding abortionist from its ranks (Dr. Henry W. Foster Jr.) to help it destroy one of America's most precious resources — children.

President Clinton is attempting to pay a political debt owed to the pro-abortion lobby by nominating one who now appears to be a not-so-well-groomed proselyte, a man who obviously has had trouble with his math for most of his adult life. (One, 12, 59, 700 — or was it 7,000 abortions, Dr. Foster?)

Dr. Foster, like many of his contemporaries, believes that the solution to teen pregnancy in America is abortion — abortion by vaginal suppositories, pill or the curette.

Dr. Foster has been groomed by Planned Parenthood for the opportunity Mr. Clinton has provided. Since Dr. Foster is black, Mr. Clinton and other abortion supporters hoped that white conservatives would not attack Dr. Foster's nomination too vigorously for fear of being called racists. Conservatives of all colors must strongly oppose the nomination of Dr. Foster.

Former Planned Parenthood President Faye Wattleton has lost her usefulness, Harvey Gantt didn't defeat Sen. Jesse Helms (in spite of Planned Parenthood's generous financial support), Joycelyn Elders was sent back to the minors, so now it's Dr. Foster's turn at bat. With the help of all those Americans who sent a message to President Clinton in November, Dr. Foster will strike out also.

The shedding of innocent blood, according to the Book of Proverbs, is what God hates. Dr. Foster's nomination must be defeated.

(THE REV.) GEORGE J. LUCAS
Petersburg, Va.

Affirmative action makes a federal career a non-starter for white men

Thanks for Jeffrey Hart's column on affirmative action ("Diminishing accent on the affirmative," Commentary, Feb. 9).

Mr. Hart's column put a much-needed spotlight on how Hubert Humphrey's and Martin Luther King's high-minded vision has been degraded into a reverse Jim Crow system in which white men are an officially disadvantaged class.

Mr. Hart struck a nice balance by showing how the system hurts whites and minorities alike — actively denying opportunities to deserving whites, while implicitly "devaluing" the real achievements of minorities. He makes the case, with admirable precision, that the practice is "self-evidently wrong."

The column by Mr. Hart connects well with a Dec. 27 Federal Report article, "Government's bad rap makes hiring good people difficult," which seems to have attracted little comment from readers. In that article, the reporter relayed government recruiters' worries that a poor media image might make it tough to attract the best college grades to government service. No doubt the reporter related accurately what recruiters said. Nevertheless, their claims that their main problems are inadequate information, a cumbersome application process and low salaries were a collective masterpiece of disingenuousness. Delicately left unmentioned were:

- Promotional freezes (except by special approval) for white men at the Department of Defense.
- Gay, lesbian or bisexual (GLOBE) groups' influencing personnel policy at some two-dozen agencies.
- Official affirmative action for gays at the Department of Agriculture.
- "Unqualified applicants only" notices for openings at the U.S. Forestry Service.
- Wholesale purging of senior white men from upper Civil Service grades.

Your Federal Report article quotes John Palguta, an official for the Merit Systems Protection Board, as saying, "It doesn't sound like a place you'd want to work." No kidding. With reports like the above leaking out regularly, the "straight," non-minority, male graduate could be forgiven for believing that a federal career might not hold much of a future for him. And with current policies in place, he would be right. Putting a lid on such reports will not, recruiters' wishes notwithstanding, make everything OK.

The deliberate "disadvantaging" of white men for federal service and the vigorous extension of these policies into the private sector was a major political blunder that, as Mr. Hart intimates, probably cost the Democratic Party control of the 104th Congress. The electorate's November 1994 "tantrum" (to use the phrase of ABC's Peter Jennings) was a warning shot across government's bow that the GOP — its erstwhile beneficiaries — would do well not to ignore.

Voters might cut Republicans a little slack on their much-publicized "Contract With America," but they are going to insist that this federally promoted anti-white-male campaign be stopped without delay. If that hasn't happened by late 1996, look for another political "earthquake" and yet another season of media mystification over what the voters might have "said." And look for this cycle to repeat itself until politicians finally (as the feminists say) "get it."

ELWOOD E. ZIMMERMAN
Wheaton

Minorities can't measure up?

That's what affirmative action policies imply, though you won't hear its liberal backers say so

BETHESDA, Md. — For years I've suspected that many liberals favor affirmative action because they believe blacks and Hispanics can't measure up to the same standards as whites, but it's been difficult to get any of them to say so publicly.

Now Rutgers University President Francis L. Lawrence, a staunch proponent of affirmative action throughout his career, has let the cat out of the bag.

In comments to a faculty group discussing the school's admission criteria, Lawrence referred to blacks as a "disadvantaged population that doesn't have the genetic, hereditary background" to score equally with whites on the Scholastic Aptitude Test.

Lawrence has since apologized for his comments — which he now says he doesn't actually believe — and students have led angry protests demanding his resignation.

COUNTERPOINTS
By Linda Chavez

But the fact is that affirmative-action programs at universities around the country operate as if Lawrence were right.

They routinely apply lower admission standards to black and Hispanic applicants, all the while pretending that such double standards won't reinforce negative stereotypes and stigmatize students admitted under them.

The University of California at Berkeley, for example, admits black and Hispanic students with test scores and grade-point averages significantly below those it requires of both white and Asian students.

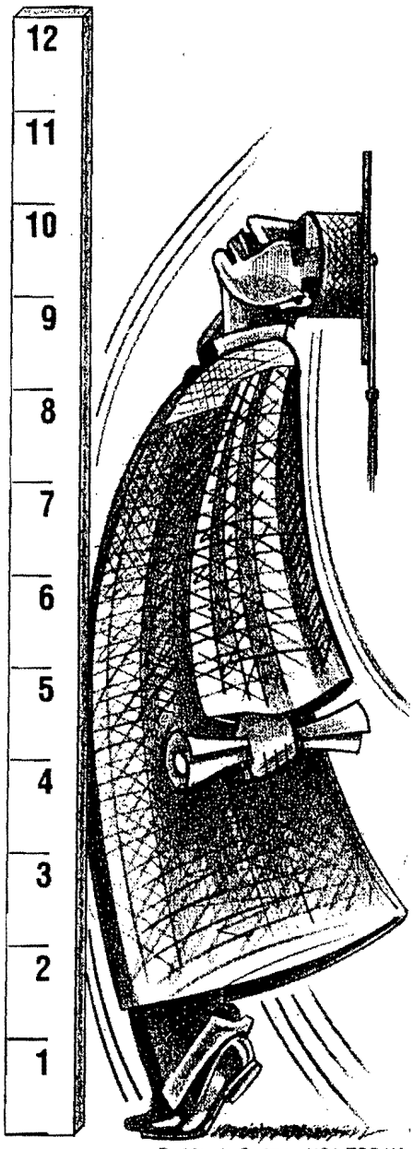
Berkeley is one of the few universities that has made available such information, even on a limited basis.

In 1989, Berkeley turned away approximately 2,800 white students with perfect 4.0 GPAs — straight As. But half of the minority students it admitted that year had below a 3.53 GPA.

And contrary to the assumptions of many affirmative-action supporters, students admitted on the basis of lower test scores and grades aren't necessarily economically disadvantaged graduates of poor inner-city schools.

At Berkeley, for example, the average Hispanic student admitted through the affirmative action program comes from a middle-class family, and many if not most attended integrated schools, often in the suburbs.

In fact, 17% of Hispanic entering freshmen admitted to Berkeley in 1989 came from families that earned more than $75,000 a year, as did 14% of black students.



By Marcia Staimer, USA TODAY

Statistics like these make it increasingly difficult for advocates to argue that affirmative action is intended to benefit disadvantaged minorities.

One Mexican-American student told researchers studying the Berkeley program she was "unaware of the things that have been going on with our people, all the injustice we've suffered, how the world really is. I thought racism didn't exist, and here, you know, it just comes to light."

No doubt she was referring to the political indoctrination many minority students receive in such programs so they'll know how "oppressed" they really are, despite attending one of the world's elite institutions of higher learning.

But the comments that racism at Berkeley "just comes to light" might just as well apply to the university's own admission standards, which clearly do treat applicants differently according to their race.

Affirmative action advocates can't have it both ways. A system that depends on holding minorities to different — and lower — standards than whites invites prejudice and bolsters bigotry.

But it also sends a clear message to the intended beneficiaries that those who claim to want to help minorities don't really believe blacks and Hispanics can ever measure up to whites.

Most supporters of affirmative action no doubt would be horrified that anyone might interpret their intentions so malignly. But their actions speak as loudly as words.

COUNTERPOINTS' four columnists provide views from diverse perspectives on today's issues. **Thursday:** Susan Estrich on the religious right. **Mondays:** Tony Snow. **Tuesdays:** Michael Gartner. **Wednesdays:** Linda Chavez.

What others are saying

"We are happily at a time when a number of the compensations that were earlier advanced to make up for earlier discrimination are no longer needed."
— *Calif. Gov. Pete Wilson*

"If the president respects the goal of affirmative action as fully as he should, he might gain political support from voters who believe in pursuing an integrated society. . . . But if he ignores the subject and lets critics set the terms of the debate . . . he's likely to be stuck with affirmative action as a thin cover for nasty, race-minded politics — the Willie Horton issue of 1996. And it's likely to contribute to his loss."
— *Lincoln Caplan*, Newsweek *magazine contributing editor*

"The people in America now are paying a price for things that were done before they were born. We did discriminate. . . . But should future generations have to pay for that?"
— *Senate Majority Leader Bob Dole*

"We know that affirmative action has created problems, abuses we didn't contemplate. But if you eliminate or severely curb . . . then what?"
— *Calif. Lt. Gov. Gray Davis*

"(It's) going to be hell. . . . You better make sure you prepare for it."
— *Franklyn Jenifer, president of the University of Texas at Dallas, warning college administrators of a backlash from minority students if affirmative action policies are removed*

The Washington Post
Wednesday, February 15, 1995

William Raspberry

Reaffirming Affirmative Action

Hugh Price, the Urban League president who warmed conservative cockles last summer with his don't-blame-it-all-on-racism admonition, told an interesting story the other day.

It was the spring of 1963, he said, and he had "really butchered" his test for admission to law school. He had been an outstanding high school student, and a solid B scholar at Amherst. But the law board score ("probably 200 points below that of the average white enrollee") threatened to derail his legal ambitions.

But Yale Law admitted him anyway—in part, no doubt, because of his race. And then . . .

"Despite that miserable test score, my grades at Yale never scraped absolute bottom. If memory serves, I finished toward the lower end of the middle third of our class. Since we had only seven blacks out of 150 students in my class, that obviously means there were many white students with higher law board tests beneath me in the rankings. Nearly all of those in the bottom quarter were white. At my 20th reunion, several Yale classmates said I was one of the 'stars' of our class."

Price, who seven months ago in Indianapolis was reminding black Americans of the need to take responsibility for their own lives, was, last week in San Francisco, warning white Americans against the out-of-hand dismissal of affirmative action.

It isn't so much that the 53-year-old Price has changed his tune as that he wants you to hear his whole song. The self-help verse is familiar, and it had an incredible range of politicians and editorialists pronouncing him "wise" and "sensible." The affirmative action verse is likely to grate on ears that hear the phrase to mean giving preference to undeserving minorities.

Price both understands the resistance and acknowledges the abuses committed in the name of affirmative action. But he cites his own law school experience to make the point that if merit, as measured by test scores, is a value worth preserving, so is inclusion, as measured by actual—not merely theoretical—opportunity.

It was a speech, not a legislative proposal, he delivered at the Commonwealth Club, so don't look for the language of lawyers and legislators. But his actual language is interesting. First, he avoids what I used to call the "merit trap"—the notion that if *some* of a thing is good, more of it must be better. This is the trap that leads us to believe that since reporters need to know how to type, the aspiring journalist who types 100 words per minute has more "merit" than the one who types just well enough to pass the cut-off. Or as Price puts it:

"It seems to me that the crucial issue in crafting admissions or hiring policies is to define the threshold qualifications or competencies for what it takes to perform satisfactorily in school or on the job. With those baseline criteria in place, the institution or employer could then utilize selection standards and procedures that enable it to fulfill its fundamental missions."

And one of those missions is (or ought to be) "to serve society by sending out well-trained graduates from all sectors and segments of society—into the private sector, of course, but also into public life, into the non-profit world, and into distressed neighborhoods."

Price's attitude makes sense to those of us who have benefited (knowingly or not) from affirmative action and who take it as perfectly reasonable to look somewhat more favorably at the candidate whose presence would add to the "diversity" of the institution and the healing of a still-torn society. We make a common-sense distinction between (1) giving the minority the nod in close cases and (2) *legislating* racial preference, or assigning race-based merit points.

But some people—not all of them racists (and not all of them white)—make no such distinction. They believe that once you start chipping at the edges of merit, you're approaching "reverse discrimination," giving coveted places to people who don't belong in them.

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Were the lower scores enough to make the black students undeserving of admission? Were all black students—and only black students—scraping bottom? Surely *some* whites must have been in the lower percentiles. Were they, on that account, also undeserving?

Good questions, to which I add these two: Will the people who lately celebrated Hugh Price's self-help exhortations still consider him reasonable and wise? Will they love him in February as they did in August?

The Washington Post

DATE: 1-31-95
PAGE: A-15

Richard Cohen

Affirmative Action Under The Gun

Many years ago, a woman was chosen over me for a promotion. When I asked a supervisor for an explanation—was she, in fact, better than I?—he said merit had nothing to do with it. I remember his words well: We needed a woman.

Was he on the level? I don't know. I once had another boss admit he sometimes lied to job applicants to spare their feelings. Whatever the facts in my case, the explanation rankles to this day. The woman in question came from a very old and still-affluent American family, while I was the first male in my family to graduate from college. How, I wondered, did she become a victim and I a member of a privileged class?

I try to balance that experience with what I know are the needs of true victims, and over the years I have been supportive of affirmative action—although with heaps of reservations. I have always believed that certain minorities, blacks in particular, needed a break. The evidence for that is so obvious it hardly needs to be detailed.

Further, I know that without affirmative action—without the government breathing down the necks of employers, colleges and other institutions—little would have been accomplished. It was not enough merely to drop racist barriers. Something more needed to be done.

"You do not take a person who for years has been hobbled by chains, liberate him, bring him to the starting line of a race and then say, 'You are free to compete with all others' and still justly believe you have been completely fair," Lyndon Johnson once said. Affirmative action was the appropriate remedy.

But no longer. An entire generation has come of age that has never seen a "whites only" sign or, for that matter, reacted in shock at the sight of a woman doing what used to be called a man's work. That hardly means racial and sexual discrimination have vanished, only that they have substantially abated and no longer require remedies that, however well intentioned, necessitate a compromising of principle. Affirmative action obscures if not obliterates individuality. It now probably does more harm than good.

In 1996 California probably will vote on a proposition that would bar affirmative action in public hiring, college admissions and contracts. In other words, the issue will be injected into the presidential race, and the White House is watching California closely, to put it mildly. It fears a polarizing brawl on the very issue that has done so much to create the modern Republican Party: race. Given what surveys tell us about the sentiment of whites, the proposition is almost certain to win.

Before matters reach that point, leading civil rights figures should recognize why affirmative action vexes so many whites—and a few blacks as well: because one form of discrimination has been replaced by another. Supporters of affirmative action should concede that it is sometimes—maybe often—misapplied. In theory, the choice is always between two persons of equal merit. In practice, that's often not the case.

Unfortunately, proponents of affirmative action seem to have dug in their heels and employed language that in its own way is as dated as Middle English. Jesse Jackson, for one, has equated California Gov. Pete Wilson (R), who favors ending legal preferences for women and minorities, to segregationists of old. "Pete Wilson of California is liken unto Wallace of Alabama," Jackson said.

Other affirmative action proponents, some of them leaders of women's organizations, have made similar statements. You would think that the choice is between affirmative action and a return to Jim Crow or, when it comes to women, the hiring or admissions practices of old. It's not. Few Americans would countenance such an outcome. Throughout America, the virtues of diversity are not only acknowledged, they are celebrated.

Ultimately, affirmative action is doomed. The electorate loathes it and the courts are giving it another look, probably a critical one. It would be foolish for the Democratic Party to lash itself to a program that will sink for one reason or another and has always troubled even some of its proponents. Racial progress will not be advanced if the Democratic Party sticks to an agenda most Americans reject—and not out of bigotry, either.

After 30 years of affirmative action, it's time to limit its application—maybe only to instances of recent discrimination. I say that with reluctance, and with full appreciation that racism endures and racists will cheer, but with the overwhelming conviction that the program has outlived its usefulness. Whatever good it has done, it violates the American creed that we must be judged as individuals, not on the basis of race or sex—a group membership over which we have no choice. The civil rights era is over. The civil liberties era must begin.

The Washington Times

DATE: 1-31-95
PAGE: A16

/GOP voting rights

When three University of Virginia law-school students discovered they had to pay $45 each to attend the state Republican nominating convention last year, they did more than get mad. They sued, claiming that Republicans were charging them a "poll tax" to participate. The party should have cleared that tax with the Justice Department in advance, they said, as required by the federal Voting Rights Act.

A lower court tossed the suit aside, but at the urging of the Clinton administration, the U.S. Supreme Court has decided to take up the case. Should the justices uphold the students' claim, the state Republican Party might as well invite the Justice Department to pull up a chair and sit in on the meeting where the party decides how it will nominate its candidates: Should it hold a primary or a convention? Better check with Attorney General Janet Reno first.

It's not an unimportant question. Given the present dissatisfaction with Sen. John Warner in the Republican Party, he seems sure to face some opposition when he seeks re-election in 1996. Should the party decide the forum for that contest? Or should a Democrat-run Justice Department? Changing the political parties involved in this case, by the way, doesn't change the answer to that question. On the face of it, the poll tax claim is absurd. A party nomination is not an election, so there aren't any polls to be taxed in the first place. Moreover, the government is not imposing the $45 fee, so it can't very well be a tax, either.

There is also the question of First Amendment rights — freedom of association — of a purely private organization at stake here. To restrict the rights of Virginia Republicans, the feds must show a compelling state interest in doing so. What is that interest?

The students say the fee deterred them from attending the convention, but one of them actually did attend. As often happens at these affairs, one of the candidates paid his way. The student says he later repaid the candidate. Solicitor General Drew S. Days warns that allowing Republicans to charge convention delegates — even to help absorb the costs of putting on the convention — "invites circumvention" of the Voting Rights Act. That is now a matter for the high court to decide.

In the meantime, the case will provide a little more evidence of the corruption of once-good intentions. The Voting Rights Act used to keep government officials from discriminating against black would-be voters by using the likes of poll taxes and literacy tests to prevent them from casting ballots. The Clinton administration would have it become the means to wade into the internal affairs of a private organization. One hopes the high court understands the difference between the two.

Los Angeles Times

DATE: 2-15-95
PAGE: A-1

Willie Brown Fervently Defends Affirmative Action

Politics: Speaker says those who would end it are racists. Rift on volatile issue grows among Democrats.

By DAVE LESHER
TIMES STAFF WRITER

SACRAMENTO—Democratic Assembly Speaker Willie Brown issued a heartfelt and personal defense of affirmative action laws Tuesday, casting himself as a victim of racial mistreatment and charging that those who seek to abolish programs to promote minority hiring are engaging in racism.

Brown, one of America's most influential black politicians, compared the critics of affirmative action to cheaters at a card table who have illicitly collected a stack of chips and, upon being discovered, want to continue the game without paying back their ill-gotten gains.

Shaking a pointed finger and raising his voice, the Speaker told dozens of reporters gathered for a regularly scheduled press conference—almost all of whom were white—that "everybody in here has been the beneficiary of preferential treatment at *my* expense—at every level in your life, at every level in your life."

Brown said it is appropriate and necessary for government to correct historic discrimination by seeking out minority contractors and by accepting minority applicants to universities over equally qualified white students. To do so is only fair, the Speaker said, because for decades the nation has operated with an "artificial system of selection" that favors whites.

"Now that the system is being challenged to let Willie's relatives in . . . suddenly there is something wrong, or unconstitutional or unacceptable," Brown said. "I'm telling you, you've got no clue what it is like . . . every day in your life to know that this is the system you are in. . . . I'm telling you, it gnaws at you day in and day out."

Brown is one of the first Democrats to speak out forcefully against a growing movement to eliminate affirmative action programs, an idea that is expected to take shape in upcoming state legislation and a ballot initiative that could face voters next year.

The Speaker's comments underscore a growing rift within the Democratic Party as leaders struggle with their response to an issue that has been portrayed as a political freight train—one that politicians are told they must either get aboard or get hit by.

Democratic strategists fear that the issue could split their ranks as liberals rally to the defense of one of the hallmark achievements of the civil rights struggle while others conclude that public sentiment no longer favors such programs. Party leaders worry that the issue could damage their chances of reelecting President Clinton.

The proposed ballot measure, crafted by a pair of Bay Area academicians, would forbid state and local governments and state universities from giving preferential treatment based on race, ethnicity or gender in hiring, contracting or admitting students. In an interview Tuesday, one of the authors dismissed Brown's charge that the measure is racist.

"As to the claim that this is racist, I find that strange because this initiative would not overturn or reverse any existing state or federal statutes about discrimination," said Tom Wood, a co-author of the proposed ballot measure. "What he's referring to is the very controversial question of whether individuals who have not been discriminated against by an employer should be given preferential treatment because they belong to a particular group. It seems to us that is not a proper policy."

Proponents of the idea contend that the law should be made colorblind instead of trying to correct past discrimination with programs that are preferential to minorities.

That premise has been endorsed by Gov. Pete Wilson, although he has so far stopped short of supporting the ballot measure. And earlier this month, the state's ranking Democrat in Sacramento, Lt. Gov. Gray Davis, disclosed that he is working with party leaders to draft an alternative to the proposed ballot measure, one that would still repeal all affirmative action laws and rules in California.

On Tuesday, Brown offered no room for compromise on the issue and no tolerance for fellow Democrats who would abandon affirmative action out of fear for their personal popularity. He also presented a deeply cynical view of California voters as people who are "narrow-minded in many cases, who are only interested in just their little sphere."

He dismissed the idea that there could be a compromise offered by Democrats in response to the proposed measure.

"The attack on affirmative action is totally phony," he said. "It would be wrong, in my opinion, to be responding in anticipation of stopping what basically is a racist move. . . . Racism does not necessarily mean malice; racism can be inadvertent. And I believe that in some cases, it may very well be inadvertent. But it is setting up a straw man."

In stern language, the San Francisco Democrat issued a warning to Clinton about rumors that the President might oppose affirmative action. And he rebuked California Democratic Party Chairman Bill Press for suggesting that Democrats should try to minimize the political damage the issue might cause the party.

"Bill Press has clearly shown his ability to lead Democrats successfully," Brown said facetiously, referring to the Republican landslide in the 1994 election.

"Listen, I am practical enough to know how Democrats love to try to survive," Brown added. "I am also practical enough to know that you don't survive unless you show some evidence of principle. . . . And until I know what you are willing to die for, I don't know what you stand for. And believe me, this is an issue on which you ought to stand up and literally say, it is a lie."

In an interview Tuesday, Press downplayed any disagreement with Brown, saying he agrees that the movement to abolish affirmative action is "racist" and that existing laws are working and ought to be protected. He said the party's internal discussion is limited to strategy about how best to

cont'd

The Washington Post

DATE: 2-15-95
PAGE: A-18

For the Record

From remarks by FBI Director Louis Freeh at a Senate Judiciary Committee hearing yesterday:

The level of crime in the United States is tragically and unequivocally high. From 1960 through 1993 . . . the number of violent crimes reported in America increased 567 percent. In the last 10 years only, it increased 51 percent. The level of fear in America is even higher. A recent survey showed 93 percent of those polled said addressing America's crime problem should be an absolute priority for the federal government. . . .

I'm also concerned about the future. The 1992 and 1993 crime rate decreased 3.1 percent—temporary good news. However, long-term trends suggest that this minor fluctuation is not sufficient to indicate any significant lasting downturn. One grim forecast concerns the volume of juvenile crime, which already has had a sharp impact on crime rates. Statistics show . . . a one percent decrease in adults arrested for violent crimes in 1993. However, the same statistics reflect a 6 percent increase in the number of juveniles arrested for violent crimes.

Population projections to the year 2000 suggest the ages of 14 to 17 will constitute one of the fastest-growing population groups. The Census Bureau reports that this age group will increase nearly 20 percent from 1990 to the end of the decade. That rate of growth, coupled with an apparent propensity for violence by many in that group, may boost the future rate of crime.

Despite the many battles and wars of this century, Americans never before have been the subjects of a foreign dictator. Ironically, they now fear becoming the victims and prisoners of violent crime and a fear imposed on America by an army of home-grown criminals.

The Washington Post

DATE: 2-15-95
PAGE: A-19

William Raspberry

Reaffirming Affirmative Action

Hugh Price, the Urban League president who warmed conservative cockles last summer with his don't-blame-it-all-on-racism admonition, told an interesting story the other day.

It was the spring of 1963, he said, and he had "really butchered" his test for admission to law school. He had been an outstanding high school student, and a solid B scholar at Amherst. But the law board score ("probably 200 points below that of the average white enrollee") threatened to derail his legal ambitions.

But Yale Law admitted him anyway—in part, no doubt, because of his race. And then . . .

"Despite that miserable test score, my grades at Yale never scraped absolute bottom. If memory serves, I finished toward the lower end of the middle third of our class. Since we had only seven blacks out of 150 students in my class, that obviously means there were many white students with higher law board tests beneath me in the rankings. Nearly all of those in the bottom quarter were white. At my 20th reunion, several Yale classmates said I was one of the 'stars' of our class."

Price, who seven months ago in Indianapolis was reminding black Americans of the need to take responsibility for their own lives, was, last week in San Francisco, warning white Americans against the out-of-hand dismissal of affirmative action.

It isn't so much that the 53-year-old Price has changed his tune as that he wants you to hear his whole song. The self-help verse is familiar, and it had an incredible range of politicians and editorialists pronouncing him "wise" and "sensible." The affirmative action verse is likely to grate on ears that hear the phrase to mean giving preference to undeserving minorities.

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And one of those missions is (or ought to be) "to serve society by sending out well-trained graduates from all sectors and segments of society—into the private sector, of course, but also into public life, into the non-profit world, and into distressed neighborhoods."

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Los Angeles Times

DATE: 2-15-95
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Comment

ON CALIFORNIA

Redirecting the Affirmative Action Express

By George Skelton

SACRAMENTO

Republicans are salivating and Democrats are shuddering at the prospect of a 1996 ballot brawl over affirmative action. It probably would generate a high voter turnout among white men, who tend to support GOP candidates. But cool heads are working behind the scenes to stave off the fight.

In the end, partisan politics may well drive this racially divisive issue onto the November ballot, giving Republicans a hot issue and chasing Democrats for cover, including President Clinton. In fact, there could be anti-affirmative action measures on ballots in several states. Again, California is leading the charge, as in past rebellions against taxes and illegal immigration.

"We're going ahead with this regardless of whether the Legislature pays attention to us," vows Glynn Custred, 57, an anthropology professor at Cal State Hayward, who with another apolitical academician has drafted the "civil rights initiative." It would forbid state and local governments and public universities from granting preferences based on race, ethnicity or gender in hiring, contracting or admitting students.

"The initiative has momentum and it can't be stopped," Custred says. "It's like a freight train moving down the track."

But in truth, this train is moving a lot slower than generally portrayed. Almost all the fuel has been supplied by news media attention.

It's a shoestring operation that hasn't even begun to raise serious money. Nor has it submitted an application to the state attorney general to begin collecting signatures to get on the ballot.

There are pluses and minuses in this for Democrats. It means there still is time to hop aboard the train and maybe help drive. But it also means that if left to propel itself, the poky train may not arrive in time for the March primary—the ballot Democrats prefer—and could run over them in the November general election.

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Bipartisan talks are under way in the Legislature with the goal of defusing this issue politically. The aim is either to place on the March ballot a state constitutional amendment Democrats grudgingly could accept, or—less likely—head off a ballot measure altogether.

One potential roadblock to agreement could be stonewalling by GOP leaders who covet the political issue more than the policy change. Another is if Democrats shy away because they're intimidated by minority and feminist groups.

A consensus is emerging: It might be OK to junk the racial gender preferences and provide breaks for people who have an economic disadvantage. Many minorities still would qualify.

"Why should a middle-class black whose parent is a stockbroker be given a preference over some hillbilly up in my district?" asks Assemblyman Bernie Richter (R-Chico).

But like other initiative supporters, Richter would allow means-test preferences only for entry-level jobs and student admissions, not in contracting and faculty hiring.

Richter, a member of the initiative advisory board, last week suggested that a ballot measure might be avoided if the Legislature just passed his anti-affirmative action bills. And he tossed that on the negotiating table.

"My [party] won't like it," asserted the Republican lawmaker. "My side wants to use it as an inflammatory wedge issue. But I'd like not to tear the state apart. The reason we have a Legislature is to deal with these kinds of problems."

□

Moderate Sen. Tom Campbell (R-Stanford), another leader in the movement, agrees that passage of Richter's bills would represent "a major, A-plus victory—underline it in red—for the principle of a colorblind government."

But he and others are leery of merely enacting statutes that might be repealed by a future Legislature or overturned by a court. They'd prefer that their proposal be embedded in the state Constitution, where it only could be changed by another vote of the people.

The hope of initiative backers is that the Legislature will copy their proposal into a constitutional amendment and place it on the March ballot, thus saving them the $1-million cost of collecting signatures. Democratic leaders would have to help muster the required two-thirds legislative vote. The Legislature also could pass separate bills dealing with economic preferences.

This seems to be the direction the train is heading—slowly, cautiously toward political accommodation.

"There's probably going to be some legislative product," says Senate President Pro Tem Bill Lockyer (D-Hayward), whose task is to protect the Democrats' narrow house majority. "There's sufficient steam that some tension has to be released."

It's better for Lockyer's party to help release that tension now than to leave it to the GOP and riled voters.

THE NATION'S NEWSPAPER
USA TODAY

DATE: 2-15-95
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Minorities can't measure up?

That's what affirmative action policies imply, though you won't hear its liberal backers say so

BETHESDA, Md. — For years I've suspected that many liberals favor affirmative action because they believe blacks and Hispanics can't measure up to the same standards as whites, but it's been difficult to get any of them to say so publicly.

Now Rutgers University President Francis L. Lawrence, a staunch proponent of affirmative action throughout his career, has let the cat out of the bag.

In comments to a faculty group discussing the school's admission criteria, Lawrence referred to blacks as a "disadvantaged population that doesn't have the genetic, hereditary background" to score equally with whites on the Scholastic Aptitude Test.

Lawrence has since apologized for his comments — which he now says he doesn't actually believe — and students have led angry protests demanding his resignation.

COUNTERPOINTS
By Linda Chavez

But the fact is that affirmative-action programs at universities around the country operate as if Lawrence were right.

They routinely apply lower admission standards to black and Hispanic applicants, all the while pretending that such double standards won't reinforce negative stereotypes and stigmatize students admitted under them.

The University of California at Berkeley, for example, admits black and Hispanic students with test scores and grade-point averages significantly below those it requires of both white and Asian students.

Berkeley is one of the few universities that has made available such information, even on a limited basis.

In 1989, Berkeley turned away approximately 2,800 white students with perfect 4.0 GPAs — straight As. But half of the minority students it admitted that year had below a 3.53 GPA.

And contrary to the assumptions of many affirmative-action supporters, students admitted on the basis of lower test scores and grades aren't necessarily economically disadvantaged graduates of poor inner-city schools.

At Berkeley, for example, the average Hispanic student admitted through the affirmative action program comes from a middle-class family, and many if not most attended integrated schools, often in the suburbs.

In fact, 17% of Hispanic entering freshmen admitted to Berkeley in 1989 came from families that earned more than $75,000 a year, as did 14% of black students.

Statistics like these make it increasingly difficult for advocates to argue that affirmative action is intended to benefit disadvantaged minorities.

One Mexican-American student told researchers studying the Berkeley program she was "unaware of the things that have been going on with our people, all the injustice we've suffered, how the world really is. I thought racism didn't exist, and here, you know, it just comes to light."

No doubt she was referring to the political indoctrination many minority students receive in such programs so they'll know how "oppressed" they really are, despite attending one of the world's elite institutions of higher learning.

But the comments that racism at Berkeley "just comes to light" might just as well apply to the university's own admission standards, which clearly do treat applicants differently according to their race.

Affirmative action advocates can't have it both ways. A system that depends on holding minorities to different — and lower — standards than whites invites prejudice and bolsters bigotry.

But it also sends a clear message to the intended beneficiaries that those who claim to want to help minorities don't really believe blacks and Hispanics can ever measure up to whites.

Most supporters of affirmative action no doubt would be horrified that anyone might interpret their intentions so malignly. But their actions speak as loudly as words.

COUNTERPOINTS' four columnists provide views from diverse perspectives on today's issues. Thursday: Susan Estrich on the religious right. Mondays: Tony Snow. Tuesdays: Michael Gartner. Wednesdays: Linda Chavez.

Cont'D

What others are saying

"We are happily at a time when a number of the compensations that were earlier advanced to make up for earlier discrimination are no longer needed."

— *Calif. Gov. Pete Wilson*

"If the president respects the goal of affirmative action as fully as he should, he might gain political support from voters who believe in pursuing an integrated society. . . . But if he ignores the subject and lets critics set the terms of the debate . . . he's likely to be stuck with affirmative action as a thin cover for nasty, race-minded politics — the Willie Horton issue of 1996. And it's likely to contribute to his loss."

— *Lincoln Caplan*, Newsweek *magazine contributing editor*

"The people in America now are paying a price for things that were done before they were born. We did discriminate. . . . But should future generations have to pay for that?"

— *Senate Majority Leader Bob Dole*

"We know that affirmative action has created problems, abuses we didn't contemplate. But if you eliminate or severely curb . . . then what?"

— *Calif. Lt. Gov. Gray Davis*

"(It's) going to be hell. . . . You better make sure you prepare for it."

— *Franklyn Jenifer, president of the University of Texas at Dallas, warning college administrators of a backlash from minority students if affirmative action policies are removed*

The Washington Post

DATE: 2-11-95
PAGE: E-1

Fair Housing Laws Under Siege on Hill

GOP Lawmakers Seek Color-Blind Society

By Ann Mariano
Washington Post Staff Writer

Some Republican lawmakers and their conservative supporters are gearing up for an effort to recast fair housing and lending laws passed over several decades. They seek a color-blind society, several congressional leaders said, in which race, ethnicity and gender will carry no weight in deciding who gets homes and apartments.

These proponents want a new federal civil rights act that forbids the government from enacting affirmative-action laws that call for "racial or gender preferences in programs, contracts or employment," according to the Institute for Justice, a conservative Republican think tank based here.

The "balkanizing of societies based on their differences is very serious and is a worldwide problem," Rep. Henry J. Hyde (R-Ill.), chairman of the House Judiciary Committee, said at a recent meeting of conservative lawmakers and activists. "We're all asserting that it's our differences that count. We seem farther apart than we ever have been despite years of busing [and] coerced integration. What we can do is take a look at quotas and preferences and how they measure up to the law."

Hyde has promised to hold hearings on the issue this year.

William Mellor, president and general counsel of the Institute for Justice, said he believes "our future civil rights policies ought to be directed toward . . . eradicating discrimination of all sorts." His organization is urging Congress to "enact a Civil Rights Act of 1995, forbidding the federal government from engaging in racial or gender preferences in programs, contracts or employment."

"We believe significant strides have been made since 1964, and we believe blacks and whites are on common ground," Mellor said.

One case in particular has angered these conservative activists. It was the Justice Department's $11 million settlement last summer—the agency's largest ever—with Chevy Chase Federal Savings Bank, the biggest thrift institution in the Washington area. The department said the bank engaged in redlining by establishing branches only in white areas and ignoring black neighborhoods in the District and Prince George's County. In its settlement, Chevy Chase agreed to invest the money in the two jurisdictions and open offices in black neighborhoods.

"My view is that things will get worse for banks. There will be more litigation and more coercive settlements like Chevy Chase," said Jonathan Macey, a law professor at Cornell University. "People will be less willing to invest" in low-income areas and the result will "equal the firebombing of inner cities."

In a remark that alarmed some civil rights advocates, Senate Majority Leader Robert J. Dole (R-Kan.) appeared last weekend to lend some support to Mellor's view. Dole questioned whether "future generations" should have to pay for the wrongs inflicted by past slavery. "Slavery was wrong, but should future generations have to pay for that? I think it's a tough question," he said.

Affirmative-action programs, created by legislation and defended by most Democrats, help minorities get jobs and public contracts. Congressional Democrats expressed fears that Dole's remarks indicate hostility to these programs and may further divide the country along racial lines.

Defenders believe such plans are here to stay.

If Congress passed a law saying "race can never play a role" in housing integration efforts or decisions, the Supreme Court probably would strike it down, in the view of John P. Relman of the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

The high court "tends to uphold decisions when they create more opportunity for African Americans than when they limit whites," Relman said. If the discrimination is "powerful and egregious enough," courts can order changes that would correct the bias "but they can't willy-nilly engage in affirmative action," he said. In affirmative-action decisions, courts order institutions or individuals to take action that will redress wrongs.

The Department of Housing and Urban Development has launched a campaign to expand homeownership for minority and low-income households though voluntary agreements with lenders. HUD is urging mortgage companies to make voluntary accords that will expand housing markets for minorities and low-income home buyers.

This week Collateral Mortgage Ltd., a large company with headquarters in Birmingham and with 30 branches in several southeastern states, signed an agreement to increase loans to minority and low-income purchasers over the next three years.

Roberta Achtenberg, HUD's assistant secretary for fair housing and equal opportunity, said such accords "reinforce our sense of community" and ensure economic viability in neighborhoods.

Relman, of the Lawyers' Committee, said most housing discrimination cases being filed now are initiated by individuals or families who sue landlords.

Shanna Smith, executive director of the National Fair Housing Alliance, said that as many whites as blacks are suing under the 1968 civil rights act and amendments passed in 1988 that extended protection to families with children.

"Real estate agents also are bringing clients to fair housing groups when their clients feel they've faced discrimination," Smith said. "We have even represented white builders."

As a result of the fair housing law's broader coverage of problems and the protections for families with children, more and more complaints of discrimination are being brought to fair housing organizations, Smith said.

"This act protects everyone," she said.

Sen. Don Nickles (R-Okla.), speaking at the same meeting as Hyde, attacked another familiar Republican target, Davis Bacon, a Depression-era federal law that permits the Labor Department to set wage rates on federal construction projects costing more than $2,000.

Nickles characterized the law as "very discriminatory . . . and the result will be that we will pay a lot more than we should in many cases." The government uses union wage rates when it sets Davis Bacon pay levels, which almost always are higher than nonunion pay scales.

Davis Bacon allows the federal government to replace "market determination" and results in waste of "billions of dollars," Nickles said.

Presidential What?

D.C. lawyer Edward Warren did some substitute teaching last week at New York University Law School for his Kirkland & Ellis partner, Kenneth Starr, the Whitewater independent counsel. Starr was busy that day with an argument before the 2nd Circuit. What a shame. Students would have loved to hear Starr teach this lesson. The subject? Presidential immunity.

From Divorce Court, With Love

Valentine's Day may be a time of love, but on Feb. 14 a lawyer's fancy turns to, well, just consider this romantic missive from divorce lawyer Cecile D. Weich. She reminds those bound for the altar around Valentine's Day to think about "prenuptial agreements. . . . Remember, the time to agree to disagree is when there is a smile on your lips and love in your heart." ■

The Washington Post

DATE: 2-17-95
PAGE: E-3

JUDY MANN

Don't Give Up on Affirmative Action

Affirmative action is something like sex: Those who enjoy it want to keep having it, and those who don't think we should all stop.

Well, as many a woman has said to a man, not so fast, honey.

The first shot against affirmative action is coming from California, where conservatives are supporting a state constitutional amendment that would prohibit public agencies from using "race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment public education, or public contracting."

It's no accident that this is coming right behind the electoral success of Proposition 187, which targeted immigrants: The white male backlash is not going to discriminate among immigrants, women or minorities. In the gun sights of the affirmative reactionaries, we're all in the cross hairs.

What is affirmative action? Heidi Hartmann, the MacArthur "genius award" recipient who runs the Institute for Women's Policy Studies, says that technically it comes in two forms. One is the presidential executive order that requires federal contractors to have goals and timetables for hiring that is representative of the labor market. A number of state and local governments have initiated similar requirements.

The other major form of affirmative action has resulted from court judgments that require public or private defendants to develop affirmative action hiring and promotion goals and timetables. "Title 7 of the 1964 Civil Rights Act does not require affirmative action," Hartmann points out. "It simply requires nondiscrimination in hiring, pay and promotion.

"The economic theory to get rid of discrimination is undoubtedly correct," says Hartmann. "You need to get the most qualified workers you can get." If a company has goals and timetables, supervisors are forced to consider hiring people that they might not otherwise even look at.

Nancy L. Davis, who heads Equal Rights Advocates, the San Francisco public interest law firm whose suit against the fire department led to the hiring of its first woman in 1987, is convinced that without affirmative action "we wouldn't have women bus drivers, women police officers, women fighting fires, women in the construction trades." Before San Francisco opened its public contracting process to women and minorities, 97 percent of its contracts went to companies owned by white men.

"The law has never required an opportunity to be made available to someone who is not qualified," says Davis. "But there has always been the presumption that quality in this nation is white and male. We're looking at pervasive assumptions abroad in this society about who is qualified, and it's going to take a long time to remedy that.

"This issue is being used to divide and push buttons," she says. "We know preference is a hot button. We have lots of different kinds of preference in this country. We have preference for athletes applying to colleges, for sons and daughters of alumni. How about veterans' preference?

"If there is a single group that has benefited above all others from affirmative action, it's white women," she says. Women are close to parity at many schools of law, business and medicine, she points out, but those professionals still don't earn as much as men and they don't become partners as quickly.

Only 6.9 percent of the seats on corporate boards are held by women, according to the New York-based research group Catalyst. Women are far more likely to be sexually harassed at work, as well as in schools, than men.

Barbara Bergmann, a professor of economics at American University and author of "Can Quotas Be Justified?," a book on affirmative action due out later this year, argues that its critics are correct in calling affirmative action quotas. "But it's justified by current barriers to equal employment opportunity. Some of them are rankly discriminatory while others are the continuation of old practices that ensure that exactly the same kind of people are going to be put in the same kind of jobs. What affirmative action does is it shakes up the selection process."

The Bureau of Labor Statistics reported that in the second quarter of 1994, for full-time workers older than 25, men's median earnings were 38 percent more than women's. "Virtually all of the studies attribute a significant part of that [pay gap] to discriminatory practices," says Bergmann.

The pay gap is ample evidence that we've got a long way to go before men and women achieve equal economic satisfaction in this country. Until that happens, affirmative action is the kind of stimulus that there's no reason to give up.

The Washington Post

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PAGE: A-25

William Raspberry

Not There Yet

Why we still need affirmative action.

Every parent who's ever driven a child 100 miles or more will recognize the question: Are we there yet?

The query—because it reflects a mixture of impatience and anxiety alongside a desire not to be too annoying—seems appropriate to the "wedge" issue of the season: affirmative action.

Opponents of the practice contend that, no matter how things used to be, qualified minorities no longer have to worry about being excluded on the basis of race. Well, maybe in *particular* cases, but those are subject to administrative or judicial remedy. In general, though, they believe it's time to get off the race kick and look at merit—to be colorblind.

And some of us wonder: Are we there yet?

Affirmative action, an idea of the Lyndon Johnson era, was based on the observable fact that institutions tend to re-create themselves unless acted upon by some outside force. It was this self-perpetuation, and not discrimination alone, that (Johnson thought) accounted for the underrepresentation of blacks and other minorities in the more desirable venues of society.

The disproportionately white office or classroom or neighborhood would go on being disproportionately white so long as the incumbents had a major role in selecting their successors. "Old boy networks," word-of-mouth reports of vacancies—even an employer's good experience with workers from a certain place—all served to keep workplaces looking more or less as they had always looked and to keep qualified others on the outside.

Johnson proposed an "outside force" to break this lock on desirable positions. Employers would be required not merely to deal fairly with whatever applicants walked through the door; they now would have to act affirmatively to desegregate their workplaces.

It was a fairly modest idea. Johnson was so certain that the qualified minorities were out there, and so sure that employers neither dared nor desired to deny them opportunity once they presented themselves, that he thought it would be enough to require them to "cast a wider net." If employers opened up their recruitment, made their vacancies known, and published their criteria, why, integration would take care of itself.

Well, it didn't quite. There was—no question of it—substantial progress. Newspapers and radio stations, prodded by Johnson's lead and example and by their own changed attitudes and necessities, started looking in unaccustomed places for prospective journalists. Universities and business offices, now required to develop plans for opening up their ranks, started to find more and more nontraditional prospects. *Qualified* prospects.

Presidents and governors found minority cabinet officers and agency heads. Big companies like IBM and Xerox became known as places where a woman or a minority could catch a break. It got to the point where only a tiny number of positions remained completely white, to where a black child could aspire to almost anything at all.

But it never quite reached the point of self-perpetuation. Some employers found ways around the new requirements. Some police and fire departments had to be hauled into court.

It got better—measurably better—and I wish the supporters of affirmative action would find the honesty to say so. But it didn't turn racial advantage upside down, as some of affirmative action's bitterest enemies have contended, and I wish the newly ascendant conservative politicians could find the honesty to say that too.

What we are hearing instead from too many of them is the insinuation that affirmative action is the reason a lot of white men are out of work, that universities and offices are bursting at the seams with unqualified black workers, that quotas are killing initiative, that gerrymandered congressional districts are balkanizing America.

And an astounding number of white men are believing these things (just as many black men believe absolutely that their color is the only reason they are out of work). I want to say to them: Forget that infamous Jesse Helms campaign commercial; your jobs have flown overseas, not to the ghetto. It's computerization and automation and corporate downsizing that are making it so hard for you to achieve the economic security your fathers enjoyed—not affirmative action. You think black people have such an unfair advantage over whites these days that it's time to undo the whole diversity effort?

As Jesse Jackson has noted: This supposedly beleaguered minority (white males are about a third of the population) make up 80 percent of the Congress, four-fifths of tenured university faculty, nine-tenths of the Senate and 92 percent of the Forbes 400.

Oh, yes, and redraw the Louisiana map to get rid of that awful gerrymandering and you know what? It's goodbye, Rep. Cleo Fields; hello, Rep. David Duke.

Are we there yet? I don't *think* so.

Los Angeles Times

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A Mainstream Future, Not Life on the Margin

Schools and businesses must redefine what it takes to have a productive life, then keep opportunities open.

By HUGH B. PRICE

We hear lots of talk from elected officials these days about contracts, compacts and covenants. About obligation and opportunity. Seldom do we see any discussion of race, any acknowledgment that race remains a searing issue in our society.

This silence stands in stark contrast to the incessant ranting on radio talk shows about angry white males and black separatists, about affirmative action and preferential treatment.

Meanwhile, affirmative action and its supposedly undeserving black beneficiaries are being positioned as the wedge issue of 1996, as were welfare and the unworthy poor in 1994.

Obsessed opponents of affirmative action are mounting assaults on every front. There are court challenges galore—to set-asides in contracts, minority scholarships and legislative redistricting. The new congressional leadership threatens to roll back federal civil-rights rules and water down federal oversight. A threatened ballot referendum, known ironically if misleadingly as the "California civil-rights initiative," would outlaw racial preference in state law and by public entities.

The crux is whether affirmative action has outlived its constitutional justification. Was it intended as a temporary measure to make amends for past discrimination? Does its continuing use run the risk of transforming racial preferences into a permanent factor in dispensing opportunities, be they contracts, college slots or jobs?

I say, unequivocally, that the job of integrating African Americans, who were isolated generation after generation by official action and unofficial practice, into the American mainstream isn't done, by any stretch of the imagination. Yes, affirmative action has helped the most prepared among us gain readier access. But it's not yet time for impatient whites and successful blacks to hoist the gangplank behind them.

The crucial issue in crafting admissions or hiring policies is to define the threshold qualifications or competencies for what it takes to perform satisfactorily in school or on the job. With those baseline criteria in place, the institution or employer could then utilize selection standards and procedures that enable it to fulfill its fundamental mission.

One such perfectly legitimate mission for a public university, for instance, is to serve society by sending well-trained graduates out into all sectors of society—into the private sector, of course, but also into public life, into the nonprofit world and into distressed neighborhoods.

Why shouldn't public universities serve society more effectively by producing well-prepared future school teachers, principals and superintendents, leaders of community development corporations, heads of urban library systems, local political leaders and so forth, together with the usual output of corporate managers and private entrepreneurs? All are of equal importance to society.

The same applies to corporations, which need employees well-versed in various cultures to penetrate new markets here and abroad. What's more, diverse student bodies better equip white graduates to function productively and harmoniously in the multicultural economic markets and workplaces that await them.

How reliably do entrance exams and grades predict eventual life success?

To broach this question is not to assail qualifications or meritocracy, but to ponder how we define "qualified" at the outset and predict meritorious achievement years later. If we value diversity and wish to advance inclusion, we need new techniques for identifying potential and nurturing talent.

Conventional schooling tends to focus on developing and rewarding students' verbal and computational ability. But other forms of intelligence contribute to life success once out in the real world. How else to explain the

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the real world. How else to explain the success of Madonna, a modestly talented singer, or Ronald Reagan, whom no one ever mistook for a *summa cum laude*? Yet both have been brilliant in their ways and hugely successful in their fields. If we are to make diversity work, then the mechanisms for apportioning opportunity must somehow take fuller account of the emerging knowledge about identifying intelligence and nurturing potential and about what it actually takes to lead a productive life that pays dividends personally and to society.

Of course, cognitive ability matters. But so do ambition, industriousness, leadership, curiosity, flexibility and other job-relevant attributes unrelated to intellect per se. Employers who understand these realities and select workers within a broad range of abilities can be both inclusive and competitive. Senior corporate executives who supervise thousands of employees tell me that African Americans are fully competitive when the performance criteria are clearly and quantifiably related to the bottom line.

African Americans want in and always have. For all the trauma experienced by the poorest of our people, millions of us have surged toward the mainstream.

Affirmative action explains much of this progress, which is welcome news for our people and for all Americans. We will continue our relentless march into the mainstream. We have absolutely no intention of turning back—or of being turned back. Our future, like every American's, lies in the mainstream, not on the margin.

Hugh B. Price is president of the National Urban League. His comments are adapted from a Feb. 10 speech to the Commonwealth Club in San Francisco.

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Who gets hurt if we ax affirmative action?

Vibes from Washington indicate white males who control Congress are about to ax affirmative action.

House Speaker Newt Gingrich says it's time to take "a hard look" at policies born in the civil rights movement of the 1960s. Senate Majority leader Bob Dole puts it more pragmatically: "Why did 62% of white males vote Republican in 1994?"

They, and others, target spin-offs of the Civil Rights Act of 1964, which bans discrimination because of a person's color, race, national origin, religion or sex. My memories go back 30 years longer.

PLAIN TALK

By Al Neuharth

USA TODAY FOUNDER

During the Depression of the 1930s, the federal government itself shamelessly practiced discrimination. The Works Progress Administration established by that legendary liberal Franklin Delano Roosevelt had these publicly posted pay standards:

- Men — $5 a day.
- Women — $3 a day.

As a 10-year-old kid whose widowed working mother was a victim, I decided that discrimination of any kind was wrong. I've since learned most people favor equal opportunity, unless it results in real or imagined loss to themselves.

Has affirmative action produced any of the "reverse or adverse" results its critics claim? Have any white males lost out to females or non-white males because of it?

Sure, some. But on balance, the good results far outweigh the bad.

Can the anti-affirmative action steamroller be stopped? White males making the noise are in the minority, as these 1995 census figures show:

- White males — 107 million
- Females and non-white males — 156 million

Most soured white males blame people of color or women. If they ax affirmative action, they may find their mothers, daughters, sisters, wives or widows among the victims.

FEEDBACK

Other views on affirmative action

"Affirmative action and quotas are discriminatory and wrong. To accept them is to take Dr. King's dream — that Americans be judged 'not by the color of their skin but by the content of their character' — and turn it on its head."

— Dan Quayle, former vice president

"It's never right to hire an unqualified candidate over a qualified candidate. But that's not what affirmative action is about."

— Deval Patrick, ass't. attorney general for civil rights

The Washington Times

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Voters — the Democrats seek them everywhere

Once the Republican majority finishes with its Contract, it would be well advised to switch over to a repeal mode, and one place it might start is with the Voter Registration Act, also known as the "motor-voter" law. Indeed, if the Republican majority doesn't repeal the motor-voter law, it might well not be a majority much longer — or ever again.

Last month, Attorney General Janet Reno announced that the Justice Department is suing four states for failing to enforce the law, and the partisan political reasons that drive the lawsuit are as transparent as a forged identity card. Unable to persuade the real American electorate to keep them in power, the Democrats are trying to invent a new electorate. That's why the motor-voter law was passed, and that's why Miss Reno is suing to enforce it.

Enacted in 1993, the law allows people to register to vote at the same time they get their drivers' licenses — as well as when they sign up for welfare benefits, unemployment compensation and disability payments. It was a major accomplishment of the late and unlamented Democratic majority, as Democratic accomplishments go, and despite President Bush's veto in 1992, they passed it again the next year.

Samuel Francis

The reason the Democrats wanted the bill so much is that it makes it easier for low-income, low-education and low-skill voters to vote — voters who often don't know or care enough about politics and citizenship to know when the election is, who's running or how to register, let alone what the issues are and what they mean.

These days, such voters just happen to be the backbone of what remains of the Democratic Party, and by facilitating their voting, the Democrats give themselves an edge in elections. These days, the Democrats desperately need an edge, and the law gives it to them by conscripting citizens so indifferent to citizenship they find it bothersome to register.

And if the welfare proletariat isn't enough to give the edge, the motor-voter law also encourages fraudulent voting by non-citizens — namely, immigrants, illegal and legal. That this is a clear purpose of the law is shown by its language that explicitly forbids state officials to verify the address and citizenship of those registering. Two of the states Justice is suing — California and Illinois — are high-impact immigration states, and a group of Republican governors, including California's Pete Wilson, has already sued the federal government to overturn the law.

One basis of the Republicans' suit is that the motor-voter law enhances the likelihood of voter fraud. Fraudulent voting by illegal aliens or legal immigrants not yet citizens has been documented in a number of elections in the past — in Florida in 1989, in Los Angeles in 1988 and in some nine California counties in 1982, to mention only a few — and Republican Michael Huffington claims alien voting helped him lose last year's California Senate race to Diane Feinstein. That was all before the motor-voter law went into effect, and Republicans should meditate, in the tranquility of their congressional suites, what will happen once the law kicks into high gear.

What will happen, even aside from voter fraud, is that the current high levels of immigration will reinforce the Democrats, rip the guts out of the Republican majority and move the political culture of this country well to the left. In a major study of immigration to be published next month by Random House, Forbes senior editor Peter Brimelow argues that "current immigration policy is inexorably reinforcing Jesse Jackson's Rainbow Coalition."

The Democrats desperately need an edge, and the law gives it to them by conscripting citizens so indifferent to citizenship they find it bothersome to register.

His argument is that immigrants who entered the United States since the 1965 immigration reform "are overwhelmingly visible minorities" who benefit the Democrats. While the Republican Party retains its "WASP foundation," "the brutal truth," Mr. Brimelow writes, "is this: the Clinton administration is a black-Hispanic-Jewish-minority white (Southerners used to call them 'scalawags') coalition."

Maybe it shouldn't be that way; maybe Republicans should seek more minority voters and Democrats address the real interests of whites who have defected to the Republicans, but Mr. Brimelow's point is that that's the way it is.

If the Democrats are going to play blatant partisan hopscotch by inventing a fake electorate and exploiting an apathetic urban underclass to bail them out of their forthcoming political extinction, the Republicans can and should feel free to play the same game — not just to preserve their own majority but also to protect real democracy and the rights of real voters by repealing the motor-voter law as soon as possible.

Samuel Francis, a columnist for The Washington Times, is nationally syndicated. His column appears here Tuesday and Friday.

The New York Times

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Conservatives Forge New Strategy To Challenge Affirmative Action

By B. DRUMMOND AYRES Jr.
Special to The New York Times

LOS ANGELES, Feb. 15 — An effort by two San Francisco-area academics to eliminate affirmative-action programs in California has set off a debate over civil rights that is rapidly spreading across the country and threatens to be one of the most divisive national dialogues in years.

The two professors, Glynn Custred and Thomas Wood, who describe themselves as "staunch conservatives," want the issue of affirmative action put to a popular vote sometime in 1996. It is an approach that poll takers and political analysts already say has the best chance yet of overturning affirmative-action laws in the state.

Mr. Custred, an anthropology professor at California State University in Hayward, said, "Affirmative action has been losing steam with the general public, and we think we've hit upon the sure way to finally reverse it and restore true color-blind fairness in the United States."

To get their proposal on the California ballot, Mr. Custred, Mr. Wood and their supporters will need to gather about a million signatures on petitions. That effort, which the two men say will begin in a matter of weeks, could cost upward of a million dollars.

Few political experts doubt that they will easily exceed both requirements.

"I think the climate is now such that they'll just blitz through," said Mervin Field, the dean of California poll takers who runs the Field Poll.

Recent polls show the effort may well succeed, not just in California but in other states, too. It is an approach that already is injecting itself into the 1996 Presidential race and one that is beginning to spark some ugly exchanges, increasingly between old friends and political allies, especially Democrats.

Even some Democrats with impeccable liberal credentials are beginning to break with their party's traditional hard-line support for affirmative action. They suggest that the system of extending special preferences based on factors like race and sex has outlived its usefulness and should be abandoned or changed so that preferences are extended only on the basis of economic need.

As for Republicans, many who once hesitated to publicly criticize affirmative action are now openly attacking it, sensing a change in the national political climate, particularly since the November 1994 elections.

Susan Estrich, a California law professor and veteran Democratic campaign strategist, sees political danger for anyone who continues to argue for maintaining affirmative action policies.

"For all its good intentions, affirmative action was never meant to be permanent, and now is truly the time to move on to some other approach," she said in an interview. "You can try to paint Republican opponents as having been captured by the far right and the like, but that's not going to make the Democratic Party the majority party again. In fact, there's a bad potential for this issue to drive a wedge right through the Democratic Party, if it doesn't yield some."

To Mr. Custred and Mr. Wood, a former philosophy professor who now heads the California Association of Scholars, a Berkeley-based group of conservative educators, affirmative action is a corruption of the civil rights laws passed in the 1960's.

Two academics say preferential treatment based on race or sex is wrong.

"The specific goal of those laws was to prohibit discrimination by reason of color, race, gender, religion and national origin," Mr. Custred said. "The laws rightly encourage reaching out, but it's a perversion to say they permit the hiring of people by quota or the admission of students without regard to academic merit or the letting of contracts according to race-based formulas."

Federal, state and local governments, agencies and schools, as well as thousands of private companies and groups across the country, rely on affirmative action as a tool of redress when hiring, promoting, awarding contracts or admitting students.

This is the proposed referendum that the professors hope to put on the California ballot next year: "Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting."

Mr. Custred and Mr. Wood initially plan to raise enough money and gather enough signatures to put the affirmative action question on the ballot in California, possibly during the March 1996 primary but more likely during the November 1996 general election. Then they plan to encourage ballot efforts in other states and, if their movement spreads, eventually pressure Congress to act.

If they succeed, next year's Presidential hopefuls will have to adjust accordingly when they come looking for votes in California, the so-called "must win" state. On the Democratic side, the adjustment will require special care, given the party's liberal history on civil rights.

Already the Custred-Wood proposal, which its authors call the California Civil Rights Initiative, has been labeled "Son of 187," a reference to Proposition 187, the immigration-control measure that California voters passed overwhelmingly on Election Day 1994 but that the courts have mostly put on hold, citing concern over its constitutionality.

Recent opinion polls indicate that dissatisfaction with affirmative action has grown to the point that about two of three Americans, including Californians, have serious doubts about the fairness of the concept, especially when remedial devices like hiring quotas and contract set asides are used.

The Republican landslide in last fall's elections was attributed in part to pent-up anger in white men, many of whom told poll takers that they were fed up with affirmative action, whether mandated by law or voluntary.

"Count me among those angry men," said Mr. Wood. "I know the sting of affirmative action. I was once passed over for a teaching job because, I was told privately, I was white and male. It didn't count that I was the most qualified. Well, we're going to put a stop to this. The worm has turned."

Aware of the polls and their implication should affirmative-action proposals begin to show up on ballots in California and elsewhere, civil rights leaders fear the worst. And the worst

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may be that many of their followers are beginning to drift away as affirmative action becomes more and more controversial.

For example, Ward Connerly, a black member of the Board of Regents of the University of California, recently asserted that the state's college admissions officers were going too far with affirmative action, directly violating a 1978 United States Supreme Court ruling involving California.

"I tell you with every fiber of my being that what we're doing is inequitable to certain people," he said. "We are relying on race and ethnicity not as one of many factors but as a dominant factor to the exclusion of all others. To those who say, 'Affirmative action now, affirmative action forever as it is now' — that's what George Wallace said about segregation."

One of the nation's leading black civil rights advocates, the Rev. Jesse Jackson, already has traveled to California to voice opposition to the Custred-Wood proposal and to any other retreat on affirmative action. He called for a "register and resist" voter campaign and warned of "poisonous" setbacks for civil rights.

Then, noting that Gov. Pete Wilson, a potential Republican Presidential candidate next year, had offered some kind words for the Custred-Wood initiative, Mr. Jackson gave some indication of just how sharp and contentious the coming debate on the issue could be.

"Pete Wilson is liken unto George Wallace of Alabama," Mr. Jackson said. "He wants to stand in front of the schoolhouse door."

Elizabeth Toledo, the head of the California branch of the National Organization for Women, that group's largest branch, was more measured in her criticism when she appeared with Mr. Jackson. But she too vowed die-hard resistance to the Custred-Wood initiative, calling it "divisive scapegoating." She declared, "This is one of the most significant attacks yet on our rights."

In Washington and elsewhere on the national political scene, members of Congress and prospective 1996 Presidential candidates are scrambling for position, some eager to run with the issue, others not sure whether to plunge into the coming fracas or to flee headlong from it.

Both President Clinton, who has supported affirmative action, and the new Republican leaders on Capitol Hill, most of whom have long held doubts about it, have assigned aides to study possible approaches and alternatives. Among suggested options: Replacing race-based and sex-based quotas with quotas based on economic need, as measured by income.

Campus Protest Against Slurs

BERKELEY, Feb. 15 — Some 200 students and faculty members from the University of California at Berkeley rallied today to denounce the distribution of fliers attacking affirmative action by using derogatory and racist terms. The fliers, placed in the mailboxes of 15 minority students at the Boalt Hall Law School, were discovered on Saturday.

"Rejoice you crybaby niggers. It's affirmative action month," the flier said in part. "When I see you in class it bugs the hell out of me because you're taking the seat of someone qualified."

University Chancellor Chang-Lin Tien offered support to the students at the rally and promised to make try to rout out those responsible

"The older I get, the more convinced I become of the centrality of the issue of race in American society," he said. "The issues surrounding it never go away. They remain under the surface for a period of time, but inevitably, it seems the melting pot boils over. We are in one of those periods now."

Nicole Wong, a fourth-year law student, said: "There are a lot of messages going out throughout the state saying racism is O.K., starting with the debate on Proposition 187 and the so-called civil rights initiative. "All those things send out these messages that people of color are an O.K. target."

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In Calif., debate rages on affirmative action

By Kevin Johnson
USA TODAY

California's Democratic state Assembly Speaker Willie Brown's blistering verbal assault on a plan to abolish affirmation action has taken the debate to a new level.

Attempts to eliminate minority preferences in hiring, government contracting and school admissions in his state are "totally and completely racist," Brown said.

"I don't care whether you are a Democrat or a Republican; I don't care whether you maintain (the issue) is a freight train or not, you ought to try to be half-assed principled on something," Brown said.

AP

BROWN: A vocal entry into debate

It was Brown's first significant statement on the proposed California Civil Rights Initiative and pending statehouse legislation.

"The whole initiative debate is the kind of issue Democrats in California probably wish never happened," said San Francisco pollster Mervin Fields. He said Democrats have the most to lose from the anti-affirmative action movement.

"There is a huge hullabaloo out there," Fields said.

Many Democrats are fearful that public opposition to affirmative action will hurt their election chances. Some have suggested an alternative that would base preferences on economic disadvantage.

Brown's strident entry into the debate raises the volume on an already divisive issue, political experts say.

"Has Willie Brown further polarized the discussion? By strongly introducing race, I think you have to say he has," said Sherry Bebitch Jeffe of the Claremont Graduate School's Center for Politics and Economics.

Said Glynn Custred, co-author of the anti-affirmative action initiative: "Willie Brown wants to judge people by their color. We're the kind of people, like Martin Luther King, who would prefer to judge people by the content of their character."

Custred and co-author Tom Wood of Berkeley hope to qualify the California Civil Rights Initiative for the March 1996 primary.

GOP Assemblyman Bernie Richter is sponsoring legislation and a proposed amendment seeking remedies similar to the initiative.

Brown said the Richter proposal is made of "whole cloth," predicting that it would fail in the Assembly.

"You tell me exactly where affirmative action has adversely impacted any white getting the job," Brown said. "Not at all. Not at all."

Los Angeles Times

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Hate Crimes Against Jews Rise in State but Decline in L.A.

■ Prejudice: Decrease in city's statistics counters nationwide trend, Anti-Defamation League reports in annual survey.

By EDWARD J. BOYER
TIMES STAFF WRITER

Although hate crimes directed against Jews were down last year in Los Angeles, such incidents were up 21% in California and reached a 16-year high nationally, Anti-Defamation League officials announced Wednesday.

Enlarged photos of a desecrated Jewish cemetery in Norwalk and swastikas spray-painted on temple doors in Glendale flanked the City Hall lectern as league regional director David A. Lehrer told reporters that his group had documented 2,066 anti-Semitic incidents across the nation in 1994.

The league's 1994 Audit of Anti-Semitic Incidents shows the highest national total since the civil rights organization began tracking such incidents 16 years ago, Lehrer said.

"Here in California, the picture is equally troubling," he said, adding that there were 232 incidents last year, a 21% increase over 1993.

"Among the most disturbing findings of the report is that vandalism has increased for the first time since 1991 and that incidents of violence, assaults, arson, threats and harassments directed at Jews continue to rise unabated," Lehrer said.

Against the "bleak backdrop" of state and national numbers, Lehrer said, anti-Semitic incidents in Los Angeles dropped from 28 in 1993 to 24 last year. He credited local political leaders such as Mayor Richard Riordan and the Los Angeles Police Department with helping to create "a more civil and tolerant society."

Los Angeles has sent out a message "that acting out one's bigotry and prejudice is unacceptable and that a price will be paid," Lehrer said. "An essay on brotherhood will no longer be the remedy for acts of hate. Legislation and firm law enforcement present the prospect of jail time for bigots who act out their sociopathic fantasies."

The league's audit cited the example of a self-described skinhead who attacked a yeshiva student in West Hollywood last July with a three-foot pipe and a screwdriver while yelling: "I hate Jews! I'll kill you!" The student and others who came to his aid were able to subdue the attacker and hold him for police. The attacker was sentenced to a year in County Jail.

Leaders in Los Angeles are "responding more frequently and with sympathy and solidarity toward victims" of hate crimes, Lehrer said.

Riordan, who appeared with league officials at Wednesday's news conference, described hate as "a cancer that eats away at the moral fiber of every human being." Although hate crimes are down in Los Angeles, Riordan said, "sadly they still exist."

Los Angeles County's annual hate crime report released last May showed that such incidents in the county were up 6.4% in 1993 from the previous year, with 773 crimes reported. For the first time since 1980, when the county began tracking incidents, gay men supplanted African Americans as the most frequent target.

The Anti-Defamation League has developed training programs for school districts and law enforcement agencies to deal with and prevent hate crimes, said Tzivia Schwartz, the group's western states civil rights director.

"We understand that the only way to prevent hate crime is to accurately assess the problem, to educate children at a very early age about issues of diversity and to respond to incidents of hate . . . forcefully," Schwartz said.

The audit's report of 141 arrests nationally for anti-Semitic crimes in 1994 is more than twice the previous year's total of 60. That increase may be attributable to factors such as more effective federal hate crime laws, improved training and increased attention from law enforcement and an increased willingness of victims to report the crimes, the audit said.

Founded in 1913, the league combats anti-Semitism through programs aimed at counteracting hatred, prejudice and bigotry.

The Washington Times

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PAUL CRAIG ROBERTS

Deflating the mortgage bias balloons

Deval Patrick has turned the U.S. Department of Justice into an instrument for violating the U.S. Constitution

A Federal Reserve study, which finds no evidence of discrimination against "protected minorities" by mortgage lenders, spells the end of Assistant Attorney General for Civil Rights Deval Patrick's reign of lawlessness. Mr. Patrick is infamous for creating law out of coerced consent decrees that are enshrining race-based privileges for blacks in mortgage-lending law.

In a notorious shakedown that won admiration in Mafia circles, Mr. Patrick forced Chevy Chase Federal Savings Bank in Maryland to agree to make mortgage loans to blacks "at either 1 percent less than the prevailing rate or one-half percent below the market rate combined with a grant to be applied to the down payment requirements."

Power corrupts, and in the Chevy Chase case, Mr. Patrick overreached. His scandalous abuse of power and disdain for the rule of law cost him allies. Mr. Patrick's power to force banks to settle the sham discrimination suits that he brought was based on the complicity of the Federal Reserve and other bank regulatory agencies. The bank regulators would block the victim bank's acquisitions and business plans until the bank gave up and signed a consent decree giving Mr. Patrick what he wanted.

Mr. Patrick's lawsuits lacked legal merit and relied on the leverage he gained by the willingness of the Federal Reserve to participate in the extortion. The victim banks would have to settle on Mr. Patrick's terms or watch their competitors outstrip them in the bid for market share.

The problem for Mr. Patrick is that, unlike the Justice Department under Janet "Waco" Reno, the Federal Reserve still has a modicum of integrity. Various of its personnel were distressed by the Fed's participation in Mr. Patrick's Mafia-style shakedown operations, and internal opposition arose.

The Federal Reserve's ability to continue in the role of strong-arm thug for Mr. Patrick ended last November when a study by Federal Reserve and other economists was released. The study examined 220,000 FHA mortgage loans and found no evidence of discrimination against minorities.

Two Nobel prize-winning economists, Gary Becker and Kenneth Arrow, have pointed out that mortgage lending discrimination would mean that lenders were holding minorities to higher standards or whites to lower standards. If this were the case, the evidence would be that minorities have lower default rates. The lower default rates, in turn, would mean minority mortgage loans would have fewer losses and, therefore, be more profitable.

The Federal Reserve economists and their colleagues examined the default rates and loan loss experience of FHA single-family residential mortgages. They found blacks defaulted at twice the rate of whites, that "black borrowers exhibit significantly higher default rates in both urban and suburban locations," and that "losses incurred in the event of default tend to be greater on loans extended to black borrowers."

Just as a lower default rate for blacks would be an indication that they were being discriminated against, the lower default rate for whites is an indication whites are suffering reverse discrimination in mortgage lending.

It is easy to see how this reverse discrimination came about. Mortgage lenders are caught between shrill allegations of racism by self-serving "community activists" and a Clinton Justice Department determined to establish privileges for blacks, such as mortgages at below market interest rates. In order to avoid the expensive lawsuits that only minorities can bring, lenders discriminate against whites by turning down marginally qualified white borrowers in favor of less-qualified black borrowers.

There is no doubt Mr. Patrick has abused the power of his office. Nothing in civil rights law requires lenders to give preferred minorities below market interest rates, or bags full of money to apply to their down payments. These race-based privileges directly violate our Constitution's requirement of equality under the law.

Deval Patrick has turned the U.S. Department of Justice into an instrument for violating the U.S. Constitution. This is grounds for Mr. Patrick's impeachment. If we are to preserve a rule of law, Congress must get impeachment hearings under way immediately. What's the point of a constitutional amendment to balance the budget if the Constitution itself has no meaning?

Paul Craig Roberts is a columnist for The Washington Times nd is nationally syndicated.

The Washington Times

DATE: 2-16-95
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MORTON KONDRACKE

Precarious course for affirmative action

The story got played on the business pages, but last week's House Ways and Means Committee vote to repeal a huge telecommunications tax break was the opening shot in a coming congressional war over racial preferences that could tear apart the Democratic Party and, maybe, the country.

Republicans are making it clear that they plan at least to challenge — and possibly to dismantle — the system of affirmative action by which minorities and women are given preferences in employment, education and government contracts.

The impact on Democrats could be catastrophic, splitting moderates who favor reform of affirmative action laws, and black leaders and liberals, who are liable to fight any change.

The impact on Democrats could be catastrophic, splitting moderates who favor reform of affirmative action laws, and black leaders and liberals, who are liable to fight any change.

It's not clear where the Clinton administration will stand on the issue, and some Democrats fear President Clinton will fail to offer leadership, will be torn between constituencies, and will suffer politically in the process.

The battle will be joined most dramatically next year over an anti-preference ballot initiative in California, and ultimately could racially divide the whole nation if African-Americans perceive white opposition to affirmative action as a racist attempt to deny opportunity to minorities.

Republicans, in other words, need to handle this issue carefully, lest the "wedge" they intend to apply just to Democrats wreck what comity exists in the nation.

Ways and Means Committee action last week on repeal of Sec. 1071 of the Internal Revenue Code was a microcosm of the battles to come.

During debate, black Rep. Charles Rangel, New York Democrat, accused committee chairman Bill Archer, Texas Republican, of "playing the race card" by denying tax breaks to companies that sell radio and TV stations to minority firms.

Archer said he resented being called a racist and claimed he simply wanted the tax laws to be "colorblind."

In fact, Democrats first tried to reform the law, under which Viacom Inc. would receive a tax break of up to $640 million for selling its cable TV system for $2.3 billion to a consortium led by a black investor, Frank Washington, with only a $1 million stake, but were voted down by Republicans.

Five moderate Democrats then voted with Republicans against a move by Mr. Rangel to preserve the racial preference. Then the committee eliminated the tax break altogether to pay for a 25 percent health insurance tax credit for the self-employed.

During the debate, one of the Democrats, Rep. Bob Matsui of California, sought to steer clear of racial issues, arguing that the Viacom tax break was "indefensible" because of its size and because Mr. Washington's contract with his partner, cable giant TCI, enables him to withdraw after only three years with a $2 million profit.

Opponents of affirmative action in government contracts contend that blacks often serve as "fronts" for white interests, and the Federal Communications Commission reported to Congress that of 192 radio stations transferred to minority ownership under Sec. 1071 since 1978, 130 were sold within a period averaging four years.

The Democratic reform proposal, written by Rep. James McDermott of Washington and rejected by the GOP majority, would have capped tax breaks at $50 million, and demanded that minority participants demonstrate real equity and management control in a partnership and hold onto the property for at least three years.

The fact that Democrats were willing to change affirmative action law to eliminate excesses illustrates the pressure that the party is under, given the tendency of "angry white males" to vote Republican.

One of the other Democrats who voted with Mr. McDermott, liberal Rep. Sander Levin of Michigan, said, "Democrats need to take a hard look at programs we've fostered, including affirmative action, not embrace them blindly or run away from them blindly."

Similarly, in California, both Democratic Party Chairman Bill Press and Lt. Gov. Gray Davis have called for affirmative action reform — in order, Mr. Press said, "to avoid a bloodbath in 1996."

It's not clear how sweeping Democratic reforms might be, but clearly one option is to base preferences on income or economic background rather than ethnicity, so that children of wealthy blacks aren't favored over those of poor whites.

Republicans, too, would do well to approach the coming conflict in a spirit of reform, not demagoguery — by, for instance, using conservative blacks and "opportunity Republicans," such as Bill Bennett, to make the case that affirmative action has been more of a burden for minorities than an advantage, particularly by raising doubts about the competence of those who get jobs or university slots through preference.

Furthermore, the GOP would be better off striving to amend preferences rather than sweep them away. This is apparently what Senate Majority Leader Bob Dole, Kansas Republican, plans to do in calling for a review of federal laws and regulations.

Mr. Dole's presidential rival, Sen. Phil Gramm of Texas, has said that, as president, he will sign an executive order eliminating all federal preferences. Angry white males may cheer such precipitous action, but blacks will view it, angrily, as a foot in the face. This society is already angry enough.

Morton Kondracke is a senior editor for Roll Call and is a nationally syndicated columnist.

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Los Angeles Times

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Students Begin Three-Day Fast to Protest Immigration Policies

Politics: Group also hopes to organize against proposals to end affirmative action rules in state. Goal is "to raise consciousness," says one.

By MARILYN MARTINEZ
SPECIAL TO THE TIMES

Seven high school and college students began a three-day fast at Olvera Street Plaza on Thursday to protest anti-immigrant politics and launch a battle against proposals to eliminate affirmative action policies statewide.

Wearing buttons declaring themselves "illegal," members of the Four Winds Student Movement took up camp in the plaza's gazebo, where they plan to spend their days in political discussion. At night, the students will take shelter at Our Lady Queen of Angels Church across the street.

The students declared the plaza a safety zone, where immigrants can ask questions about Proposition 187 and get information about becoming citizens.

Organizers said the student group, which meets monthly at Occidental College, evolved from the massive student walkouts protesting Proposition 187 before last November's election.

"We were on the offensive for Proposition 187 and we want to be on the offensive for affirmative action," said Cesar Cruz, 20, a UC Irvine student. "What happened with 187 was a lesson."

The measure, approved by voters last November, would deny most public services to illegal immigrants and requires public agencies and police to report suspected illegal immigrants to the Immigration and Naturalization Service.

A federal judge has issued a preliminary injunction against enforcement of the measure, which is being challenged in court by civil rights groups. Proponents of the measure argue that illegal immigrants are a financial drain on the state's already-depressed economy.

The California Civil Rights Initiative, which will be on the ballot in 1996 if backers can gather the signatures of 616,000 registered voters, would amend the state Constitution to eliminate affirmative action. The issue, advocated by those who believe such policies amount to reverse discrimination, is also being explored by state legislators.

Glenn Spencer, head of Voices of Citizens Together, a grass-roots organization that sponsored the measure, said the hunger strike will raise public consciousness on the issues. Several well-wishers cheered the students.

"I admire these people," said Marguerita Gonzalez, 60, of Long Beach. "I am from Mexico. I support them all the way."

The fast is scheduled to end Saturday with a 10 a.m. march from Broadway and Olympic Boulevard to the plaza. Organizers said they anticipate 1,000 marchers.

"What were doing is to try to raise consciousness," said Angel Cervantes, 22, an Occidental College student. "We are all human beings. We should all be treated that way."

Los Angeles Times

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Limit Asked on Scope of Prop. 187 Challenge

■ Courts: Backer of initiative urges judge to block L.A. Unified School District from using public funds to contribute to legal battle.

By PAUL FELDMAN
TIMES STAFF WRITER

A lawyer for a leading proponent of Proposition 187 asked a Los Angeles Superior Court judge Thursday to order Los Angeles school officials to stop using public funds to fight the illegal immigration initiative in court.

Judge Robert H. O'Brien made no immediate decision on activist Glenn Spencer's request that the Los Angeles Unified School District be enjoined from participating in lawsuits against the popular but divisive ballot measure. But O'Brien, expressing skepticism toward the arguments of Spencer's attorney, Bruce Gleason, emphasized that the issue before him was not whether school officials are wise in litigating against Proposition 187 but whether they have the legal right to do so.

"This court's role is just to [determine] . . . if they're acting outside the scope of their authority," O'Brien said during a brief hearing on the request for a preliminary injunction. "It's as simple as that."

O'Brien is expected to issue his ruling today.

Hours after the initiative was approved by a 3-2 margin in November, the Los Angeles school district, along with the San Francisco Unified School District and the California School Boards Assn., filed a lawsuit in San Francisco Superior Court questioning the measure's constitutionality. That day, a judge agreed to temporarily bar the proposition's requirement that illegal immigrants be excluded from California public schools. The judge cited a 1982 U.S. Supreme Court decision that granted illegal immigrants the right to a free public education in Texas.

The following month, Spencer, president of Voice of Citizens Together, filed a lawsuit charging that the Los Angeles school district and six school board members were illegally using public funds to block the measure.

After Thursday's hearing, Spencer, who contends that public entities should stay out of lawsuits fighting voter-approved initiatives, said he thought O'Brien was likely to rule against an injunction. Spencer added that the legal move was "an interesting step but not vital" to his overall lawsuit, which asks that the six board members personally repay the school district for the expenses of the suit filed in San Francisco and for flyers concerning Proposition 187 that were sent to parents of schoolchildren before the November election.

Richard K. Mason, general counsel for L.A. Unified, said Thursday that the suit filed by the school boards has probably cost the district $200,000 but that it is by no means a frivolous expense.

"It is the right of the Board of Education to go to court to determine the constitutionality of the measure before we implement it," Mason said. "And it it quite clear that this initiative is not constitutional."

Conservatives Forge New Strategy To Challenge Affirmative Action

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By B. DRUMMOND AYRES Jr.
Special to The New York Times

LOS ANGELES, Feb. 15 — An effort by two San Francisco-area academics to eliminate affirmative action programs in California has set off a debate over civil rights that is rapidly spreading across the country and threatens to be one of the most divisive national dialogues in years.

The two professors, Glynn Custred and Thomas Wood, who describe themselves as staunch conservatives, want the issue of affirmative action put to a popular vote sometime in 1996. It is an approach that poll takers and political analysts already say has the best chance yet of overturning affirmative-action laws in the state.

Mr. Custred, an anthropology professor at California State University in Hayward, said: "Affirmative action has been losing steam with the general public, and we think we've hit upon the sure way to finally reverse it and restore true color-blind fairness in the United States."

To get their proposal on the California ballot, Mr. Custred, Mr. Wood and their supporters will need to gather about a million signatures on petitions. That effort, which the two men say will begin in a matter of weeks, could cost upward of a million dollars.

Few political experts doubt that they will easily exceed both requirements.

"I think the climate is now such that they'll just blitz through," said Mervin Field, the dean of California poll takers who runs the Field Poll.

Recent polls show the effort may well succeed, not just in California but in other states, too. It is an approach that already is injecting itself into the 1996 Presidential race and one that is beginning to spark some ugly exchanges, increasingly between old friends and political al-

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lies, especially Democrats.

Even some Democrats with impeccable liberal credentials are beginning to break with their party's traditional hard-line support for affirmative action. They suggest that the system of extending special preferences based on factors like race and sex has outlived its usefulness and should be abandoned or changed so that preferences are extended only on the basis of economic need.

As for Republicans, many who once hesitated to publicly criticize affirmative action are now openly attacking it, sensing a change in the national political climate, particularly since the November 1994 elections.

Susan Estrich, a California law professor and veteran Democratic campaign strategist, sees political danger for anyone who continues to argue for maintaining affirmative action policies.

"For all its good intentions, affirmative action was never meant to be permanent, and now is truly the time to move on to some other approach," she said in an interview. "You can try to paint Republican opponents as having been captured by the far right and the like, but that's not going to make the Democratic Party the majority party again. In fact, there's a bad potential for this issue to drive a wedge right through the Democratic Party, if it doesn't yield some."

To Mr. Custred and Mr. Wood, a former philosophy professor who

Two academics say preferential treatment based on race or sex is wrong.

now heads the California Association of Scholars, a Berkeley-based group of conservative educators, affirmative action is a corruption of the civil rights laws passed in the 1960's.

"The specific goal of those laws was to prohibit discrimination by reason of color, race, gender, religion and national origin," Mr. Custred said. "The laws rightly encourage reaching out, but it's a perversion to say they permit the hiring of people by quota or the admission of students without regard to academic merit or the letting of contracts according to race-based formulas."

Federal, state and local governments, agencies and schools, as well as thousands of private companies and groups across the country, rely on affirmative action as a tool of redress when hiring, promoting, awarding contracts or admitting students.

This is the proposed referendum that the professors hope to put on the California ballot next year: "Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting."

Mr. Custred and Mr. Wood initially plan to raise enough money and gather enough signatures to put the affirmative action question on the ballot in California, possibly during the March 1996 primary but more likely during the November 1996 general election. Then they plan to encourage ballot efforts in other states and, if their movement spreads, eventually pressure Congress to act.

If they succeed, next year's Presidential hopefuls will have to adjust accordingly when they come looking for votes in California, the so-called "must win" state. On the Democratic side, the adjustment will require special care, given the party's liberal history on civil rights.

Already the Custred-Wood proposal, which its authors call the California Civil Rights Initiative, has been labeled "Son of 187," a reference to Proposition 187, the immigration-control measure that California voters passed overwhelmingly on Election Day 1994 but that the courts have mostly put on hold, citing concern over its constitutionality.

Recent opinion polls indicate that dissatisfaction with affirmative action has grown to the point that about two of three Americans, including Californians, have serious doubts about the fairness of the concept, especially when remedial devices like hiring quotas and contract set-asides are used.

The Republican landslide in last fall's elections was attributed in part to pent-up anger in white men, many of whom told poll takers that they were fed up with affirmative action, whether mandated by law or voluntary.

"Count me among those angry men," said Mr. Wood. "I know the sting of affirmative action. I was once passed over for a teaching job because, I was told privately, I was white and male. It didn't count that I was the most qualified. Well, we're going to put a stop to this. The worm has turned."

Aware of the polls and their implication should affirmative-action proposals begin to show up on ballots in California and elsewhere, civil rights leaders fear the worst. And the worst may be that many of their followers are beginning to drift away as affirmative action becomes more and more controversial.

For example, Ward Connerly, a black member of the Board of Regents of the University of California, recently asserted that the state's college admissions officers were going too far with affirmative action, directly violating a 1978 United States Supreme Court ruling involving California.

"I tell you with every fiber of my being that what we're doing is inequitable to certain people," he said. "We are relying on race and ethnicity not as one of many factors but as a dominant factor to the exclusion of all others. To those who say, 'Affirmative action now, affirmative action forever as it is now' — that's what George Wallace said about segregation."

One of the nation's leading black civil rights advocates, the Rev. Jesse Jackson, already has traveled to California to voice opposition to the Custred-Wood proposal and to any other retreat on affirmative action. He called for a "register and resist" voter campaign and warned of "poisonous" setbacks for civil rights.

Then, noting that Gov. Pete Wilson, a potential Republican Presidential candidate next year, had offered some kind words for the Custred-Wood initiative, Mr. Jackson gave some indication of just how sharp and contentious the coming debate on the issue could be.

"Pete Wilson is liken unto George Wallace of Alabama," Mr. Jackson said. "He wants to stand in front of the schoolhouse door."

Elizabeth Toledo, the head of the California branch of the National Organization for Women, that group's largest branch, was more measured in her criticism when she appeared with Mr. Jackson. But she too vowed die-hard resistance to the Custred-Wood initiative, calling it divisive scapegoating. She declared: "This is one of the most significant attacks yet on our rights."

In Washington and elsewhere on the national political scene, members of Congress and prospective 1996 Presidential candidates are scrambling for position, some eager to run with the issue, others not sure whether to plunge into the coming fracas or to flee headlong from it.

Both President Clinton, who has supported affirmative action, and the new Republican leaders on Capitol Hill, most of whom have long held doubts about it, have assigned aides to study possible approaches and alternatives. Among suggested options: Replacing race-based and sex-based quotas with quotas based on economic need, as measured by

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PHOTOCOPY PRESERVATION

THE NEW YORK TIMES, THURSDAY, FEBRUARY 16, 1995

George Bush, left, Bill Clinton, center, and Gerald Ford practicing on the driving range yesterday.

Caution: Presidents at Play. Three of Them.

A1

By TODD S. PURDUM
Special to The New York Times

INDIAN WELLS, Calif., Feb. 15 — On the brilliant emerald fairways of the Indian Wells Country Club, "How does the President lie?" was a perfectly friendly question today.

The answer, after Bill Clinton's first drive, was "far right and in a sand trap."

Gerald R. Ford hooked his drive into the crowd, shouting an alarmed "Fore!" almost before he finished his swing, and later hit a shot that struck a woman in the finger.

George Bush was even less lucky: on the first hole, he sent his second shot ricocheting off a tree and it struck an elderly woman on the bridge of her nose, breaking her glasses and leaving blood all over her face. On the 14th hole, he hit another spectator, a man, in the back of the leg. Mr. Bush balanced out his blunders, though, with a sweetly sunk birdie on the sixth hole.

In all, it was as lovely, extraordinary, if slightly dangerous day for the Presidents current and former as they played 18 bipartisan holes for charity with Bob (Friend of Presidents) Hope.

"We are as nervous as cats," Mr. Clinton confessed to Dick Enberg, the NBC sports broadcaster, just before teeing off against the knife-edge backdrop of the Santa Rosa Mountains in this enclave near Palm Springs. "We were just talking about it. We're just as nervous as can be."

Mr. Bush said his goal was "just to get it in the air," and Mr. Ford added presciently, "I would advise people

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they should stay behind us."

Under the watchful gaze of thousands of spectators, who thronged the course on the opening day of the 36th annual Bob Hope Chrysler Classic, Mr. Hope and the Presidential trio formed a team with Scott Hoch, the tournament's defending champion. They played against other pro-amateur pairings featuring golfers like Arnold Palmer, and Curtis Strange and movie stars and athletes who included Clint Eastwood, Johnny Bench, Lawrence Taylor and Joe Pesci.

By the back nine holes, crowds were ducking right and left as presidential shots went awry, with one of Mr. Clinton's shots landing in a yard adjoining the fairway, where a crowd of revelers urged him just to pick it up and drop it back on the fairway. (He did, but not before checking with tournament officials.)

The three hackers, as Mr. Ford called them, gave each other putts and praised each other's drives. But subtle signs of intramural competition were apparent, especially between Mr. Clinton and Mr. Bush. In fact, Mr. Bush won with a score of 92, followed by Mr. Clinton with 93 and Mr. Ford with 100. Mr. Hoch beat them all, of course, with a 70.

On one hole with Mr. Bush surveying him carefully, Mr. Clinton bit his lower lip and took a few tense practice swings, then just barely topped the ball with a weak shot. On the practice range before teeing off, Mr. Bush told his caddie to move his

It was a bipartisan day on the links for Messrs. Clinton, Bush and Ford.

bags farther from Mr. Clinton, explaining in his best Dana Carvey voice, "Don't want to crowd the President."

But Mr. Bush did not always have the upper hand. After a double bogey on a tough par 4 hole, he plopped down on the grass at the edge of the green in white khakis and saddle shoes, shaking his head ruefully and complaining to his caddy, "A big fa 61!" And on the next hole Mr. Clinton with his first shot lying a good 50 o 60 yards ahead of Mr. Bush's, coul afford to be magnanimous about Mr Bush's second shot, shouting "Ohhhh, *great* shot!"

Then again, at age 48, Mr. Clinto had the advantage of youth. Mr Bush is 70 and Mr. Ford 81. Mr Hope, who will be 92 in May, didn really keep score. Mr. Hope, the au thor of "Confessions of a Hooker," started some holes with a bal dropped mid-fairway and made i clear he could not see where the green was or where his shots went But he stepped lightly out of his custom Chrysler golf cart in his NBC Sports cap and he hit them straigh and clean. His wife, Dolores, t whom he will have been married fo 61 years on Sunday, watched from a nearby cart.

Mr. Clinton said Mr. Hope had invited him to play in the tourna ment last year, but his schedule had not permitted it. This year, though, a President who has been going out of his way to say he wants to work with Republicans seemed only too happy to pay his respects to his predecessors and to others in this valley of rich Republicans, where Presidents since Dwight D. Eisenhower have played golf and where Mr. Ford has a home. On his arrival on Tuesday night, Mr. Clinton stopped off for a private visit at the estate of Walter H. Annenberg, the millionaire publisher who was Ronald Reagan's ambassador to Britain.

The President did take some pains to sound a populist note, as he emphasized in the interview with Mr. Enberg that golf was no longer the preserve of the elites, however much it may have been today.

"All kinds of people, all these new courses coming up, public courses, people able to play who never could have played 10, 20 years ago," he said. "And that's very rewarding, because it's a sport that you can play throughout your life and at all different skill levels. It's really a perfect sport for our people."

The worst accident of the day was Mr. Bush's ricochet on the first hole into the head of Norma Earley, a spectator from Vista, Calif. Mr. Bush went over to apologize and tournament officials said she needed several stitches to close a cut at the bridge of her nose. But Mr. Bush's second victim, John C. Wrynd of Chula Vista, was luckier: he only got hit in the back of the upper thigh.

"How's the wound?" Mr. Bush asked.

"No blood, no problem," Mr. Wrynd replied before Mr. Bush autographed the ball.

U.S. Sets Rules on Au Pairs

By STEVEN GREENHOUSE
Special to The New York Times

WASHINGTON, Feb. 15 — The Clinton Administration issued new regulations today for the nation's 10,000 foreign in-home child-care workers that set new standards for those who care for children under 2 years old and bar them from caring for infants under 3 months.

The rules also require families employing the au pairs to pay them a weekly stipend of $115, up from the current $100 but considerably less than the $155 the Administration proposed in its initial revision of the rules in December.

Officials at the the United States Information Agency, which issued the regulations in its capacity of regulating foreign educational programs, said the pay had been scaled back from the December proposal in response to criticisms from hundreds of families that use au pairs as well as the eight agencies that place them in American homes.

Several of the agencies had complained that the proposed higher stipend would have reduced the demand for au pairs and put the agencies out of business.

In another easing of the December proposal, the Administration scrapped a plan to require that au pairs caring for children under age 2 be at least 21 years old. But the agency will require that an au pair caring for such children have at least six months experience or training in infant care. This rule was added, officials said, partly in response to a Virginia incident in which a Dutch au pair was charged with shaking an infant to death.

The new regulations bar au pairs from caring for children under 3 months old.

To reinforce the educational aspects of the program, the regulations require au pairs to take at least six hours of college credit courses. Families must pay up to $500 for education for an au pair, up from the current $300.

PHOTOCOPY
PRESERVATION

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COLUMN RIGHT/
JAMES P. PINKERTON

Affirmative Action Is Dead; Let's Move On

■ Quotas killed a good idea. We need to redefine the concept to fix class disparities.

Since affirmative action is going to end, we ought to start thinking about what should replace it. Today, the anti-quota cloud on the horizon is no bigger than a fist, but one doesn't need to be a weatherman to know which way the storm front is blowing. The California Civil Rights Initiative, sure to be on the ballot next year, will terminate the Golden State's racial preferences. And that thunderclap will help demolish the legal structure of quotas across America.

Four pillars have upheld the current system as it mutated from equal opportunity into mandatory racial allocations. But soon, all four will fall like dominoes.

The first domino is public opinion. Poll data is sketchy because pollsters don't frame questions about race in the same stark terms as Middle Americans do when they gather around their kitchen tables. But the pro-quota forces must know that they can't win at the ballot box; that's why they have always looked to the courts and the bureaucracy to do their legal trench work.

The second domino is Congress. We will look back at the 1993 nomination of Lani Guinier for the Justice Department's top civil-rights post as a turning point. She was "qualified" in terms of legal acumen, but her out-of-the-mainstream views rendered her unfit in the eyes of even the Democratic-controlled Senate. Today, not only is Congress Republican, but it's led by Southerners. Sen. Bob Dole of Kansas is the closest thing to a Yankee in the GOP leadership; the rest are from places like Georgia, Mississippi and Texas.

The third domino is the executive branch. The President's latest survival idea is the "middle-class bill of rights"; he'll do as little as possible for the non-middle in the next two years. Besides, Clinton, having shot his wad on health care, is mostly irrelevant to the future debate—and will be even more so after 1996.

The fourth domino is the judiciary. It's said that the Supreme Court follows election returns; if so, then the first new indicator may be the case of Adarand Constructors vs. Federico Peña, argued before the court this week, in which a white Colorado contractor who was the low bidder challenges a federal highway contract awarded to a minority. But whatever the court decides, the judicial armor around quotas will persist for awhile. Plenty of lifetime-tenured judges remain loyal to the quota programs they helped create, but if those liberal judges are not replaced with like-minded activists, then those programs will die off as their protectors pass from the scene.

'Are middle-class African Americans more deserving than poor Scotch-Irish from Appalachia? Are Aleuts and Pacific Islanders really more discriminated against than Arab Americans?'

So what will come next? The sad part of this story is that affirmative action is not a bad idea. Quotas, however, are a terrible idea. In the short run they are merely divisive; in the long run they summon up, from the base of people's brains, the furies of unintended consequences. Those who, with the best of intentions, have emphasized racial categories at the expense of colorblindness must bear some responsibility for legitimizing the racially categorizing thinking that results. One such result is "The Bell Curve," the book by Charles Murray and Richard Herrnstein that speculates on the linkage between race and IQ. Further down that same unpleasant road lie backlash, breakup and Bosnia-ization.

So the first challenge should be to separate voluntary multiracial outreach from what critics call a racial spoils system. That's not easy to do, but the American people support a merit system that allows Colin Powell, Maya Angelou, Bill Cosby and everyone else to climb as far as their talents will take them.

Second, we should focus on those who most need help. Are middle-class African Americans more deserving than poor Scotch-Irish from Appalachia? Are Aleuts and Pacific Islanders really more discriminated against than Arab Americans? Since not everyone can get special treatment, people of goodwill need to redefine affirmative action along class lines, on the principle that society's first obligation is t uplift the poor. The current quota syster does nothing for the underclass, includin the 10,000 young black men killed by gun every year.

The once and future high ground on civi rights was best expressed by Martin Lu ther King Jr. in his 1963 "I have a dream speech from the steps of the Lincol Memorial. Whoever embraces his words, i which he looked forward to the day whe people "will not be judged by the color o their skin but by the content of thei character," will deserve victory in th coming debate.

James P. Pinkerton is a lecturer at th Graduate School of Political Management a George Washington University.

The Washington Times

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PAGE: A10

The new Hatch act has captive audience

Utah senator sits in seat of power

By Laurie Kellman
THE WASHINGTON TIMES

This year, the Salt Lake City lawyer formerly dubbed "Borin' Orrin" by his Senate colleagues has his own contract with the nation, but it's not humdrum.

Sen. Orrin Hatch, the new chairman of the Judiciary Committee, opposes the term-limits bill but won't bottle it up in his committee. He'll introduce a plan to overhaul the 1994 crime law and later this year will support efforts to strike a ban on assault weapons.

And in his second stint as a chairman — he headed the Labor and Human Resources Commitee during the 1980s — he has some advice for Senate Majority Leader Bob Dole: Clamp down on Democrats trying to slow down the GOP agenda.

"Sooner or later, Dole is just going to have to say: 'OK, that's the end. We're not going to take any more of it,' " Mr. Hatch said in an interview last week in his Capitol Hill office. "We can keep them in on weekends, all night long — and there are ways of doing it — and I think sooner or later he's going to have to do it.

"People are going to have to see that two can play this game," he said.

The polite senator isn't likely to quote Rush Limbaugh directly, but his message to Democrats inclined to block the GOP's plans: Get over it.

The facts, he points out, are these: The Republicans have regained control of Congress for the first time in 40 years, and in his fourth Senate term, the Utah Republican heads one of the most influential committees in Congress.

That makes him part of the leadership. His clout, he says, is proof of his opinion that term limits would rob the institution of influential leaders.

"I'll tell you, if I call a bureaucrat, they better jump. If my state is being abused, they'd better stop it," Mr. Hatch said. "I have to say that they know they have to deal with me."

So do the Democrats.

"Things are going to be different," he said. "I now control the [committee] agenda."

Hearings on the Senate bill to overhaul the 1994 crime law are expected to start next month, he said. A subcommittee of the House Judiciary committee begins hearings on that version today.

The two versions are expected to be much the same in concept, with most differences focused on the amount of funding for prison construction and how much to increase sentences for certain violent crimes.

The 60-year-old Pittsburgh native plans to sponsor an overhaul of the crime bill passed last year by throwing out what he considers an array of "wasteful" social spending.

And providing some money for police officers but requiring localities to match it puts too much burden on small cities that can't afford the matching funds, he says.

"The 1994 crime bill did have some useful provisions in it. Had the liberal Democrats in the House not gummed up the bill, I would have voted for it in the end," Mr. Hatch said. "They just put so much pork in it and softened some of the anti-crime provisions — I just couldn't support it."

He especially objects to the $5 billion in social spending his bill proposes to spend on block grants for localities.

And the 1994 bill's assault weapons ban is an especially grievous example of government "trying to tell people what they can and can't own," Mr. Hatch said. "It's getting out of hand."

But like many Republicans seeking to pass as many bills as quickly as possible, Mr. Hatch doesn't believe the measure should be brought up as part of his crime bill.

Another staple of the GOP agenda that will come before his committee is term limits, and the chairmen of the two Judiciary commitees have pledged to let it survive their panels.

"We are in agreement on that," Mr. Hatch said of himself and his counterpart in the House, Judiciary Chariman Henry Hyde of Illionis. "It's significant constitutional matter that deserves to be debated. That doesn't mean I endorse it."

He won't likely be swayed from his opposition. "I think it will be horrible over time, and I don't think you're going to get a better Congress — I think you're going to get a worse Congress," he said.

Limiting the amount of time members can serve will result in two groups being elected, Mr. Hyde believes. "You'll get wealthy people who consider this a social climbing place for them, by and large, or those who never had it so good because they never had a job this good in their lives.

"People who are really of substance . . . are not going to give up their careers for 12 years here, knowing you don't become anything after that," he said. "It's just that simple."

The Washington Post

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PAGE: A-6

Justices Show Division On Race-Based Policies

Preferences for Minority Contractors Debated

By Joan Biskupic
Washington Post Staff Writer

Justice Antonin Scalia, playing the devil's advocate in a case yesterday on racial hiring, asked whether the federal government could adopt a policy of preference for white applicants.

Scalia told the government's lawyer to suppose that the space agency, because of a need for perfection, presumed that whites are more educated than blacks and would be better-suited for a job. How would that differ from a contracting program that presumes blacks and Hispanics are economically disadvantaged?

The difference, said Solicitor General Drew S. Days III, is that the policy presuming minorities are disadvantaged—which he was defending yesterday—is "attempting to remedy racial discrimination." He emphasized Congress's "unique and comprehensive" power to help the victims of segregation's vestiges and continued prejudice.

Yesterday's arguments revealed how divided the Supreme Court is on race-based preferences and how close the justices are to reversing the effects of a 1980 decision that first endorsed federal set-asides and prompted numerous states and local governments to give minority preferences in contracting.

Conflict over the validity of affirmative action has been building nationwide and the courtroom was packed yesterday. Retired Justice William J. Brennan Jr., a liberal bulwark who had written a 1990 opinion upholding race preferences, was there. In frail health and using a wheelchair, Brennan was stone still as he watched the give-and-take.

The Transportation Department practice at issue gives money bonuses to prime contractors on federal deals that subcontract with "disadvantaged" companies. The underlying policy presumes that blacks, Hispanics, American Indians and Asians are "disadvantaged." It was challenged by a white-owned construction firm that lost a guardrail project in the San Juan National Forest in southern Colorado.

The company, Adarand Constructors, submitted the low bid but was bypassed by the prime contractor in favor of a Hispanic firm. By hiring the minority-owned company, the prime contractor made an extra $10,000 from the government.

Adarand's lawyer, William Perry Pendley, told the justices yesterday the policy was based on an "impermissible racial stereotype" that violated the Constitution's guarantee of equal protection of the laws.

Days argued that the program, arising from a 1978 small-business law, is a constitutional effort to compensate for "well-documented discrimination." (As an assistant attorney general in the Carter administration, Days successfully argued the 1980 case that gave Congress broad latitude to use racial criteria to remedy discrimination.)

The court has changed dramatically since the 1980s, and a majority of the justices have made clear in various ways their abhorrence for racial classifications.

As he has done in recent cases, Justice David H. Souter, who succeeded Brennan in 1990, picked up the mantle for the more liberal minority. Souter questioned whether Adarand had adequately demonstrated that it lost the contract because of the presumption of minority disadvantage. Pendley insisted that was indisputable.

Souter also emphasized that the government's policy says the presumption can be overturned if proof emerges that the company has no economic disadvantage.

He favorably compared the transportation bonus to the public works program upheld in 1980. Pendley said it was hard for private firms like Adarand to collect data and evidence sufficient to challenge another company's "disadvantaged" status.

Days acknowledged under questioning that he did not know of any third party that had successfully challenged an award.

To Chief Justice William H. Rehnquist's questions about why the government did not target small, struggling companies, irrespective of race, Days said the reality was that federal procurement dollars were not getting to minority firms that historically had been subject to discrimination.

In 1990, when the Supreme Court last upheld a federal race preference, in broadcast licenses, it was by one vote. Only one member of that five-justice majority remains, John Paul Stevens. The four dissenters—Rehnquist, Scalia, Sandra Day O'Connor and Anthony M. Kennedy, who said distinctions based on race are dangerous—are still on the court. Clarence Thomas, who came onto the court in 1991, opposes affirmative action.

A decision in the case, *Adarand Constructors v. Pena*, is expected by late June.

Separately yesterday, the court without comment let stand a child-pornography conviction in a highly publicized case involving videotapes in which the subjects never appeared nude. The case attracted great congressional scrutiny and national attention after the Clinton administration twice amended its definition of hard-core pornography.

Yesterday's action in *Knox v. United States* left intact a Pennsylvania man's conviction for buying videos that focused on the genital areas of scantily clad young girls.

The Justice Department initially asserted that the standard used to convict Stephen V. Knox was impermissibly broad, but after great public uproar, it endorsed Knox's conviction.

The New York Times

DATE: 1-18-95
PAGE: D-20

Affirmative Action Challenge Seems to Perplex High Court

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Jan. 17 — As a vehicle for a major Supreme Court pronouncement on the constitutionality of Government-sponsored affirmative action, a case that came before the Court today appeared an unlikely, even a poor candidate by the end of an hourlong argument that left some of the Court's strongest opponents of affirmative action visibly frustrated.

"We may have a case here in which we can't decide an issue we thought we were going to decide," Justice Antonin Scalia said at one point after Solicitor General Drew S. Days 3d, defending the highway construction program at issue on behalf of the Clinton Administration, said the case might not properly be before the Court.

Based on the Constitution's guarantee of equal protection, the case is a challenge by a white contractor to a Federal program that offers a financial bonus to general contractors on Federal projects who subcontract part of the work to small companies that have been certified as "disadvantaged business enterprises."

The white-owned construction company, Adarand Constructors, of Colorado Springs, underbid a Hispanic-owned company by $1,700 on a $100,000 Federal highway guardrail project in southwestern Colorado. But Adarand lost the job because the general contractor chose to earn a $10,000 bonus by hiring the "disadvantaged business," the Gonzales Construction Company.

Under the Federal Small Business Act and a 1987 Federal highway law, the category of "disadvantaged business enterprise" is not based exclusively on race and can include white-owned companies. Companies owned by members of racial and ethnic minority groups are presumed to be "socially and economically disadvantaged," although that presumption is open to challenge as applied to any particular company. Adarand did not bring such a challenge but went to Federal court with its constitutional case instead, challenging what it described as an unconstitutional preference on the basis of race.

Two lower Federal courts in Colorado ruled against the company on the basis of Supreme Court precedent. So when the Justices agreed last September to hear Adarand's appeal, the constitutional and practical stakes were obviously substantial, not only for Adarand and the small business contracting program but for the increasingly tenuous underpinning for Government-sponsored affirmative action in general.

Support on the Court for affirmative action, never enthusiastic even when the Court's membership was markedly more liberal, has dwindled to the vanishing point over the last five years. Minority set-aside programs administered by state and local governments must meet stringent tests under a 1989 Supreme Court decision, City of Richmond v. Croson. Federal Government programs have remained subject to a less exacting standard of review, but the Court's willingness to adhere to those precedents is open to substantial question.

A sweeping ruling appears unlikely in a case challenging racial incentives.

But the moment of truth for Federal affirmative action may not yet have arrived. The argument today made clear that the Adarand case has procedural problems and factual idiosyncracies that threaten either to derail it or to produce a decision of less than sweeping significance.

The most obvious problem is the question of whether Adarand had standing to bring its challenge in the first place, since it failed to show in the lower courts that the Gonzales Construction Company had been included in the "disadvantaged business" category because of race or that it did not deserve to be on the list for racially neutral reasons.

Several Justices suggested by their questions that since Adarand is challenging the presumptive equation of race with economic disadvantage, it should be required to show that the presumption worked to Adarand's disadvantage in this case, and that Gonzales did not have another valid basis for its inclusion on the special subcontractor list. The Clinton Administration has strongly argued this point in its effort to minimize the potential impact of the case.

Another factor that makes a sweeping ruling less likely is the operation of the law itself, which does not work as a mandatory set-aside or numerical quota. The Small Business Act program differs from the program the Court considered in its most directly relevant precedent, a 1980 decision called Fullilove v. Klutznick, in which the Court upheld a requirement that 10 percent of the money spent on a Federal public works program go to companies owned by members of minority groups.

Under the Small Business Act, by contrast, the general contractors are not required to participate, and race gives only a presumptive rather than an automatic preference.

William Perry Pendley, the Adarand company's lawyer, had apparently made a strategic decision not to ask the Court to overrule the Fullilove decision in this case, Adarand Constructors v. Peña, No. 93-1841. But that left him in the awkward position of arguing that the Court could strike down the Small Business Act program without disturbing the Fullilove precedent.

A Justice suggests that the Court may be unable to decide an issue.

"But how can you say that?" Justice Ruth Bader Ginsburg asked Mr. Pendley. "Fullilove involved a straight-out set-aside, with no flexibility at all," she continued. "Here, it's as flexible as possible."

Mr. Pendley replied that the prime contractor is "economically compelled" as a practical matter to agree to hire a minority subcontractor in order to qualify for the bonus, which can be as much as 2 percent of the total contract. He also argued that the law's provision for challenges to be brought to the designation of a minority-owned company as a disadvantaged business enterprise was "not consistent with the real world" because, without subpoena power or the ability to gather information, small white-owned companies like his client could not make such challenges.

Cont'd

Several Justices, including Sandra Day O'Connor, whose vote may well control the outcome of the case, questioned Solicitor General Days closely about the means for bringing challenges. Mr. Days said the regulations for the program listed 25 reasons for removing a company's eligibility to participate. He said that "hundreds" of companies have been removed. But he could not cite a specific challenge that had been brought by a competing subcontractor.

"What limit is there, if any, to the Government's ability to use race as a presumption in its programs?" Justice Scalia asked Mr. Days. He asked whether the space program, with a "critical need for perfection," could employ a presumption that whites, because they are generally better educated, should be hired, although non-whites would be free to try to prove that they were qualified.

"You're overlooking the remedial purpose" of the contracting program at issue, Mr. Days replied. He said that had a "unique and comprehensive power to legislate to remedy the effects of racial discrimination."

"No question," Justice Scalia said, "but can it do it through race-based presumptions?"

Yes, Mr. Days replied, citing the Fullilove case as a precedent.

There was one light moment during the argument, when Justice David H. Souter asked Mr. Pendley to identify the "flaw" in the statute. Justice Souter is a New Hampshire native who, like his fellow northern New Englanders, drops final "r's" from some words and adds them to others.

Mr. Pendley looked puzzled. "Excuse me, the *floor*?" he repeated.

No, *flaw*, Justice Souter said, this time in standard English. "Excuse me, it's my regional accent," he said, grinning.

Los Angeles Times

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PAGE: A-5

Supreme Court Hears Affirmative Action Challenge

Judiciary: Federal law favoring minority contractors hangs in the balance. White contractor claims a 'racial stereotype' is fostered.

By DAVID G. SAVAGE
TIMES STAFF WRITER

WASHINGTON—With the fate of federal affirmative action likely hanging in the balance, the Supreme Court on Tuesday heard two conflicting accounts of how those programs work in practice.

A lawyer for a white contractor said that federal law creates "an impermissible racial stereotype" in its contracting rules. All whites are penalized and all minority entrepreneurs are given an advantage solely because of their race or ethnic heritage, he said.

"All they do is step forward and prove their race," Denver attorney William Perry Pendley said of the minority contractors.

But the Clinton Administration's top courtroom lawyer said that federal law merely sets forth a "presumption" that blacks, Latinos, Asians and Native Americans have suffered an economic disadvantage because of their race and heritage. Minority entrepreneurs who are not "disadvantaged" are not entitled to preferences, U.S. Solicitor Drew S. Days III told the justices.

During the hourlong argument, the justices sounded sharply divided over whether Congress can continue to require that federal agencies employ racial and ethnic preferences in awarding billions of dollars in contracts.

A more liberal court has upheld such affirmative action programs in the past but the justices in September agreed to consider the white contractor's claim that the Constitution demands a color-blind approach.

Since 1978, the Small Business Act has required all federal agencies to give at least 5% of their contract awards to small "disadvantaged enterprises." Agencies "shall presume" that firms headed by blacks, Latinos, Asians or Native Americans are disadvantaged, the law says.

It also says whites who lose a contract because of this preference can challenge whether the minority entrepreneur is truly disadvantaged, but it is not clear how.

"As a practical matter, how can he challenge it?" O'Connor asked at one point. The federal regulations do not define when a minority contractor is no longer "disadvantaged." They also say that no one will "investigate" minority individuals to check on their economic status.

When pressed, Days was forced to admit that he could not cite an example of when a white contractor was able to successfully challenge a minority businessman as not disadvantaged. A ruling in the case (Adarand Contractors vs. Pena, 93-1841) is due by July.

In a second case heard Tuesday, the justices signaled that, because of a procedural problem, they probably would dismiss a California welfare dispute.

Led by Gov. Pete Wilson, the state wants to temporarily pay lower welfare benefits to new residents of California. A federal judge had ruled the two-tiered system unconstitutional because it penalizes interstate migration. The high court had agreed in September to hear the state's appeal.

But on Tuesday, the state's hopes were dashed in the opening moments of the oral argument.

Justices Ruth Bader Ginsburg and David H. Souter noted that the state no longer has a federal waiver that would allow it to use the two-tiered system of benefits for old and new residents.

In 1992, officials of the George Bush Administration gave the state permission to go ahead with its change in welfare payments but the regulatory move was invalidated by a federal appeals court in July. And the Clinton Administration has yet to issue a new federal waiver. That means, even if the Supreme Court were to uphold California's two-tiered approach, the state could not enforce its law.

Early next week, the justices could issue an order that dismisses the case (Anderson vs. Green, 94-197).

Why the court agreed to hear the state's appeal is puzzling. In September, legal aid lawyers filed a brief in the case clearly stating that the matter was "moot" because of the invalidated federal waiver.

Also on Tuesday, the justices let stan the child pornography conviction of Pennsylvania man who bought video showing scantily clad young girls (Knox vs United States, 94-413).

Last year, the case of Stephen Kno became a political embarrassment for th Clinton Administration. Conservative charged the Administration's lawyers wit being "soft on pornography" because the filed a brief with the court asserting tha the law punished only those who dealt in depictions of nude children, not those in which children posed in scanty attire. After the criticism, Clinton publicly repudiated that view.

But Congress resolved the dispute last year in the crime bill by making it clear that it is illegal to make, sell or own lewd photos of young children, even if they are clothed.

Without comment, the court dismissed the final appeal of the case (Knox vs. United States, 94-413).

THE WALL STREET JOURNAL.

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PAGE: B-3

Affirmative-Action Plan Is Assailed In Supreme Court

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – A top Clinton administration lawyer encountered hostility from some Supreme Court justices when he defended a federal construction program that favors minority road builders.

In oral arguments, Solicitor General Drew Days stressed that as a technical matter, the program under attack benefits socially and economically "disadvantaged" companies, and doesn't amount to reverse discrimination against whites.

But conservative members of the high court fired back that the program hinges on race because it assumes that blacks and other minorities are disadvantaged.

Mr. Days stumbled when asked whether white-owned companies could effectively object to a successful minority-owned competitor being classified as disadvantaged. "You don't know of any" examples, snapped Justice Antonin Scalia. "That's correct," Mr. Days conceded, quickly adding that government procurement officers have rejected some minority companies that don't need special help.

The case was brought by Randy Pech, a white Colorado man who installs highway guardrails and claims to have lost business because of racial preferences. It has been one of the most closely watched cases of the Supreme Court's 1994-95 term, and a decision is expected by July.

Unless a procedural issue sidetracks the court, there appear to be at least five votes to roll back federal affirmative action: those of Chief Justice William Rehnquist and Justices Scalia, Clarence Thomas, Anthony Kennedy and Sandra Day O'Connor.

The high-court case illustrates the difficult choices facing the administration on affirmative action. Republicans bolstered by their sweeping November victory are planning to assault affirmative-action policies not only in courts – a process under way for some years – but also in Congress and the states.

The White House hasn't settled on a comprehensive strategy to respond to the coming offensive. Some administration officials privately insist that to keep the traditional Democratic base of black and women voters, as well as members of public-employee unions, Mr. Clinton has to fight the antiaffirmative-action push. Other Clinton aides, however, contend he should concede that some programs aren't effective or fair and need reform.

Mr. Days yesterday offered an understated defense, lacking any powerful appeal for the need to use affirmative action to achieve equity in the marketplace. He got some tentative support from the more centrist justices.

The construction program at issue provides a 1.5% premium to prime contractors that give 10% or more of their subcontracts to minority-owned firms. Mr. Pech submitted the low bid for the guardrail work on a project in southwest Colorado, but the job was given to a Hispanic competitor.

(Adarand Constructors Inc. vs. Pena)

THE NATION'S NEWSPAPER
USA TODAY

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PAGE: 5-A

O'Connor vote pivotal in white man's bias case

By Tony Mauro
USA TODAY

Supreme Court Justice Sandra Day O'Connor may hold the key to the future of federal affirmative action programs aimed at boosting minority-owned businesses.

The court heard oral arguments Tuesday in a case brought by Randy Pech, a Colorado contractor who claims his company lost a federal road construction job because he is white.

Adarand Constructors was low bidder in a 1990 subcontracting job, but the contract went to a Hispanic-owned firm because a federal program gives a $10,000 bonus to contractors that give work to "disadvantaged business enterprises."

White-owned firms "cannot compete on an equal footing" because of the program, said William Pendley, lawyer for Adarand.

But Solicitor General Drew Days, the Clinton administration's top lawyer before the court, said the program was a valid way of remedying "the continuing effects of well-documented discrimination."

The outcome of the case depends on a high-stakes guessing game: which side will get the five votes necessary for a majority.

By Tim Dillon, USA TODAY

O'CONNOR: Conservative but most likely justice to waver

The last time the court endorsed affirmative action was in a 5-4 ruling in 1990.

Four of the five supporters of affirmative action have since left the court, while the four conservative justices who opposed affirmative action — including O'Connor — have remained.

Three of the new justices — David Souter, Ruth Ginsburg and Stephen Breyer — seemed sympathetic to affirmative action in their questioning.

Clarence Thomas, the fourth new justice, was silent as usual. But, he is known to be an opponent of affirmative action programs, which would give that side of the issue a fifth vote and a majority — unless one of the four earlier opponents of affirmative action defects.

Both sides have focused on O'Connor as the most likely justice to waver, and her demeanor was closely watched Tuesday. She asked tough questions, but seemed generally interested in distinguishing the affirmative action program at issue in the case from other more race-conscious programs — suggesting a possible compromise or narrow opinion.

A decision could come anytime before July.

Also Tuesday, the court:

▶ Let stand the child pornography conviction of Stephen Knox of Pennsylvania in a case that brought criticism of the Clinton administration's stand on the issue.

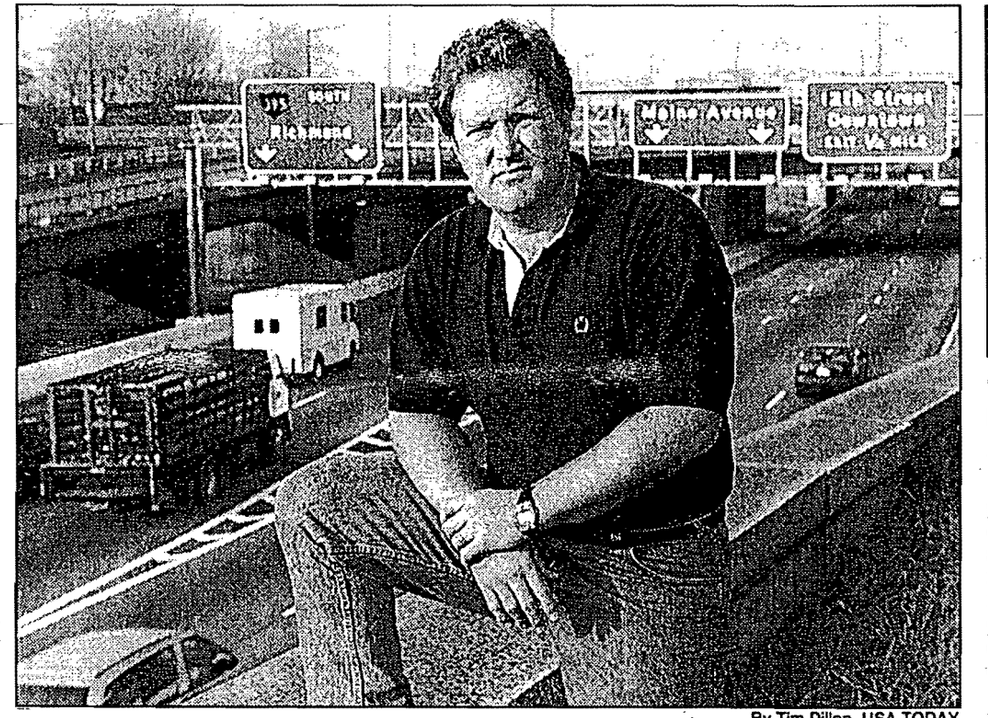
▶ Turned down the request of New Jersey Holocaust survivor Hugo Princz to require Germany to pay him $17 million for his suffering in Nazi concentration camps.

In court: Civil rights of whites

Contractor vs. racial preference

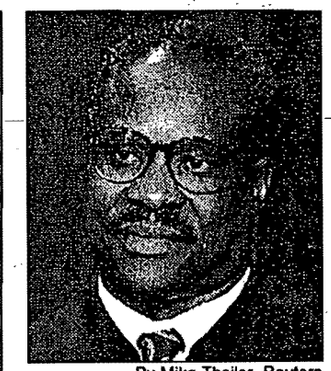
By Tony Mauro
USA TODAY

TUESDAY, JANUARY 17, 1995 • USA TODAY



By Tim Dillon, USA TODAY

BIAS CLAIM: 'It totally rubs me the wrong way for the government to encourage discrimination against me based on my race,' says Randy Pech, a Colorado Springs businessman.



By Mike Theiler, Reuters

THOMAS: Opposes racial preferences, may tip balance.

Randy Pech stands as a prime example of the leading political symbol of the day: the angry white male.

Pech is angry that his Colorado Springs business, Adarand Constructors Inc., lost a federal road-building contract because he is white. He sued, and today the Supreme Court will consider his case in a crucial test of whether affirmative action programs violate the civil rights of whites.

"It totally rubs me the wrong way for the government to encourage discrimination against me based on my race," says Pech, 40. "We're not allowed to discriminate, but the government does it all the time."

Pech's complaint couldn't come at a worse time for civil rights advocates, who point to affirmative action programs as job-creating success stories on the road to racial equality.

Thousands of minority-owned businesses have sprung up, eligible for more than $13 billion in federal funds each year, as well as state, local and private-sector benefits.

In Congress and at the state level — it may go on the ballot next year in California — affirmative action programs giving minorities an advantage in jobs and benefits are under assault.

And at the Supreme Court, which embraced affirmative action in the 1978 *Bakke* case as a remedy for past discrimination, the mood is changing.

Four of five justices who voted for affirmative action when it last came up in 1990 have retired from the court. Among the replacements is Clarence Thomas, the nine-member court's only black member. He opposes racial preferences and could tip the balance.

"This case could significantly alter what has become the largest social engineering program in American history," says Fred Lynch of Claremont McKenna College, author of a book on affirmative action.

"There has not been another time in history when there has been such a significant shift in the ideology of the court," says Todd Welch of the Mountain States Legal Foundation, which is representing Pech.

The dispute began when Mountain Gravel & Construction Co., prime contractor for a federal highway job, sought bids for subcontractors to do guardrail work. Pech's company was low bidder at $102,000.

The contract went instead to a Hispanic-owned firm. The federal road program gave Mountain Gravel a $10,000 bonus for giving work to a "disadvantaged business enterprise."

Pech says he might understand the racial preference if minority contractors were struggling in Colorado. But he says in his segment of the industry, his is the only white-owned firm left, while minority-owned firms are thriving.

But affirmative action or set-aside programs get fewer than 1% of federal procurement dollars, says Anthony Robinson of the Minority Business Enterprise Legal Defense and Education Fund.

"Absent these programs, minority businesses will not be used," he says. "You do business with people you are comfortable with. That's how it is."

Increasingly, though, the Supreme Court has become uncomfortable with government actions that show preference for one race. In a 1993 voting rights case, the court frowned on redrawing congressional districts solely to boost chances of minority candidates.

The Clinton administration strongly defends the program, arguing it benefits the disadvantaged, no matter what their race — a broader category used in an increasing number of set-aside programs.

Welch insists the program is based on race and violates the Constitution. He says there is no evidence any white-owned company has ever been deemed disadvantaged under the road program.

Civil rights advocates hope for a ruling that won't do away with all race-conscious affirmative action programs.

If Pech wins in a broad ruling, says Stephen Ralston of the NAACP Legal Defense Fund, "It's hard to see how any program that even thinks of race could survive."

No nip and tuck for Hillary, spokesman says

JEANNIE WILLIAMS

News & Views

Hillary Rodham Clinton's image is in the spotlight again with a "Nip & Tuck Award" from *Longevity* magazine.

She's presenting herself better, one plastic surgeon is quoted as saying of the 47-year-old first lady. February's *Longevity* says several pros suspect that Clinton recently had her eyes done, and that a chin implant is the reason her "once-jowly jawline has sharpened."

But **Neel Lattimore,** a spokesman for the first lady, said Monday that "she is undeserving of this award — she simply has had none (plastic surgery) done." He added, "If it had been done since she was first lady, I would know."

The magazine guesses which celebs have had work done in the past year. **Oprah Winfrey, Bo Derek, Angela Lansbury, Jane Fonda, Robert Wagner** and **Raquel Welch** are among those scrutinized. They couldn't be reached Monday; more denials can be expected.

WASHINGTON

Director: AID needed 'now more than ever'

The head of the United States' embattled foreign aid agency went on the offensive Monday to try to disarm its critics, mostly Republicans, who want to reduce, if not abolish, the U.S. Agency for International Development.

"Occasionally, the demagoguery and the epithets are painful," said J. Brian Atwood, AID director.

Even a recent secretary of State, James Baker, now believes AID is no longer needed, he acknowledged.

In a speech to the International Development Conference in Washington, Atwood took note of criticisms leveled at AID and the foreign aid program by congressional leaders, including Sen. Jesse Helms, R-N.C., the new chairman of the Senate Foreign Relations Committee.

Atwood said disease, falling food production and poverty will cause more migration and instability in coming years, adding, "Now more than ever we need a strong institution capable of addressing those threats." Currently, the U.S. aid program totals about $14 billion, more than a third of it going to Egypt and Israel. *— Juan J. Walte*

SCHWARZKOPF CLEARED: A Pentagon investigation cleared retired Army general Norman Schwarzkopf of allegations that he improperly benefited from the help of military officers and enlistees while working on memoirs.

Pentagon Inspector General Derek Vander Schaaf found "no improprieties" in the assistance Schwarzkopf received from three Air Force enlistees. But the report, dated Dec. 23, 1994, concludes that an Army major and a Navy chief petty officer should not have made scores of trips to Schwarzkopf's home at government expense.

AP

SCHWARZKOPF: No wrong in writing

Schwarzkopf, who commanded allied forces in the 1990-91 Persian Gulf war, said he was unaware that the officers were being reimbursed by the government for the 140 trips they made to his home. He later reimbursed the Treasury Department $1,608.50 for the mileage costs.

CAMPAIGN ODDS: British bookies are eyeing the 1996 presidential race, says Ladbrokes, a leading British bookmaker. Ladbrokes sets 5-to-2 odds that President Clinton will win re-election. Close behind are three Republicans: Senate Majority Leader Bob Dole of Kansas at odds of 5-to-1, followed by Texas Sen. Phil Gramm at 7-to-1 and former Tennessee governor Lamar Alexander at 8-to-1.

CLINTON'S REPORT CARD: After a roller-coaster first term, President Clinton is ranked 16th among the 41 presidents in a new survey. Ex-president George Bush's rating plunged from 18th four years ago to 31st in the latest survey of 168 historians and political scientists by Siena College. Franklin Roosevelt still ranks first, scoring 84.76 points out of 100. Abraham Lincoln is second. Teddy Roosevelt is third, replacing Thomas Jefferson. George Washington is fourth. Clinton's report: high marks for an ability to compromise, for court appointments, and for imagination. Low marks: integrity and foreign policy. *— John Omicinski*

TUESDAY, JANUARY 17, 1995 • USA TODAY

THE WALL STREET JOURNAL MONDAY, MARCH 18, 1996

Foes of Affirmative Action Target SBA's 8(a) Program

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL

McCrossan Construction Co. has already helped hasten the demise of a $1 billion-a-year federal affirmative-action program. Now the firm is coming back for more.

Last fall, facing a lawsuit filed by the Minneapolis-based builder, the Clinton administration decided that, in light of a tough new constitutional standard imposed by the Supreme Court last June, the government couldn't plausibly defend the $1 billion Pentagon contracting set-aside program. The administration killed the program instead.

Tomorrow, in a closely watched hearing in U.S. district court in Las Cruces, N.M., lawyers for McCrossan will press a new lawsuit that seeks to strike down as reverse-discrimination an even bigger federal set-aside, the Small Business Administration's $4.6 billion-a-year Section 8(a) program. This time, the administration will fight back.

The largest and best-known device for steering government procurement dollars to small minority-owned businesses, the 8(a) program is also under attack in federal court in Washington, D.C., where a similar hearing in a separate case is scheduled for next month. These two far-flung proceedings provide the first opportunity to see the Justice Department's strategy for protecting not just 8(a), but a whole range of affirmative-action efforts in the uncertain legal environment created by the top court's 1995 ruling.

The two suits have drawn intense attention among companies that do business with the government, both white-owned and minority-owned. The prospect that the 8(a) program will get struck down "scares me terribly," says Roxanne Rivera, who hopes that, with the SBA's help, her Albuquerque, N.M., firm can obtain a $3 million-a-year general-construction contract at the White Sands Missile Range. "If they do away with these programs," she adds, "we'll go back to the way things were in the 1950s."

On the other side of this clash, Charles Gaasland, a former laborer who heads McCrossan's operations in New Mexico, maintains, "This whole [affirmative-action] thing is getting to the point of being ridiculous, and we're going to try to stop it." McCrossan's latest suit was sparked by the setting aside of the very contract Ms. Rivera has her eye on. At full value, the work could be worth $15 million over five years, and Mr. Gaasland declares that "any company that can handle that scale of work isn't disadvantaged."

As a formal matter, McCrossan's lawyers will be asking Judge Howard Bratton, a semi-retired Lyndon Johnson appointee, for a preliminary injunction stopping the government from reserving the White Sands contract exclusively for 8(a) participants. But McCrossan's legal arguments, if logically extended, could be used as the basis for striking down the entire program. The rulings from Judge Bratton and his counterpart in Washington, which could come in a matter of weeks, won't necessarily be definitive. But they likely will set some of the preliminary terms of battle for other already-launched court fights involving a wide range of affirmative-action programs.

In its 5-4 ruling last June, the Supreme Court said for the first time that federal affirmative-action programs had to meet the same tough constitutional standard – known as "strict scrutiny" – imposed six years earlier on state and local programs. Justice Sandra Day O'Connor left some ambiguities in her majority opinion. But she rejected the Clinton administration's argument in the case that Congress, because of its position as a "co-equal branch of government" and its authority to enforce the constitutional guarantee of "equal protection," should get far greater leeway to use racially oriented policies than, say, a city council.

The $1 billion Pentagon set-aside that was the target of McCrossan's first suit couldn't stand up under strict scrutiny, which requires that a program serve a "compelling government interest" in a "narrowly tailored" fashion. The military set-aside resulted in huge percentages of construction work in some areas being reserved for minority-owned firms – a result that clearly violated the narrow-tailoring requirement and would have resulted in its being eliminated even if there hadn't been the pressure of litigation, says Associate Attorney General John Schmidt.

In contrast, says Mr. Schmidt, the Justice Department's top affirmative-action official, the 8(a) program has safeguards designed to ensure that it narrowly serves its purpose of nurturing businesses owned by members of minority groups historically excluded from the commercial mainstream. Named for its place in the statute book, 8(a) gives the SBA authority to serve as an intermediary between minority-owned companies and federal agencies that want to see some of their work handled by such firms. The safeguards Mr. Schmidt points to include personal net-worth limits that are supposed to keep out the wealthy, oversight to make sure that companies are genuinely owned by minorities, and rules that force 8(a) companies to seek private-sector work and leave the program after a maximum of nine years.

"The contracts are targeted in a way that is reasonably directed at remedying the discrimination Congress is worried about," Mr. Schmidt asserts. Moreover, he adds, the O'Connor opinion left some room for lower courts to give Congress "deference" in determining whether there's a need for affirmative action in procurement. And Justice Department lawyers will point to voluminous congressional findings, as well as to statistics generated by the SBA, to illustrate the fact that nonwhites haven't been proportionately represented in the pool of companies getting government work.

McCrossan's lawyers will fire back that the Supreme Court has demanded much more: "particularized" findings of discrimination in the specific industry and market – in this instance, construction in the Southwest. The Clinton administration doesn't have those numbers – at least for now – and insists it isn't obliged to produce them. "It really is an open question . . . what statistics we'll need," says Eric Benderson, the SBA's litigation chief. "These cases will begin to answer it."

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Congressional MONITOR

CQ

Clock Starts Ticking Again on Shutdown

Senate expects vote on long-term fiscal '96 spending bill by midweek; floors may see action on immigration, grazing, product liability bills

Congress faces another high-stakes budget showdown this week, as lawmakers attempt to reach agreement on a major omnibus spending bill to end the budget impasse and prevent another partial shutdown of the government.

THIS WEEK IN CONGRESS

The Senate will vote on a number of amendments to that fiscal 1996 wrapup spending bill tomorrow, and leaders are hoping to send the measure to conference with the House by midweek to allow for final action later in the week.

The current one-week continuing resolution expires Friday. But if the pace of work on the omnibus spending bill is slowed by extended floor debate or by a difficult conference, as is expected, Congress may need to pass another brief stopgap spending bill at week's end.

President Clinton tomorrow will send more details on his fiscal 1997 budget to Capitol Hill.

The House is expected to weigh in on a major immigration overhaul bill this week. And the Senate may take up a new bill rewriting policies governing federal grazing lands.

Both chambers may act on the conference report to a product liability bill.

In politics this week, there are two congressional primaries scheduled, one in Illinois and one in Ohio. Presidential primaries will be held in Illinois, Michigan, Ohio and Wisconsin.

• AGE DISCRIMINATION

The Senate Labor and Human Resources Committee on Wednesday will mark up legislation — passed by the House nearly a year ago — that would allow states and localities to impose maximum hiring ages and early retirement policies for public safety workers, such as police and firefighters.

The bill (HR 849) would amend the 1967 Age Discrimination in Employment Act, which prohibits employers from discriminating against workers age 40 or older. In 1986, the protection was removed in the case of public safety employees because of the often physically and mentally demanding nature of their jobs, but that exemption expired at the end of 1993.

Opponents, led by the American Association of Retired Persons, argue that the bill would discriminate against older people. They say the measure could force the retirement of workers who can still perform their duties.

ECONOMICS AND FINANCE

• PRESIDENT CLINTON'S BUDGET

President Clinton tomorrow morning will release a detailed version of his fiscal 1997 budget, six weeks after he submitted a 14-page outline of his priorities to Congress.

With the big numbers already released and budget leaders still focused on the stalled fiscal 1996 plan, Congress isn't eagerly awaiting Clinton's proposal.

But his detailed plan will officially kick off budget season and foster debate on whether Congress should wade into the same mire that continues to stall the fiscal 1996 plan as it works on its fiscal 1997 budget resolution.

Clinton's budget release will also set off the usual plethora of budget briefings by federal agencies and departments and hearings on Capitol Hill.

The president's budget director, Alice M. Rivlin, is scheduled to testify Wednesday and Thursday before the Senate and House Budget panels. House Appropriations subcommittees have already begun their hearings on the fiscal 1997 spending bills.

Clinton's initial budget outline called for $1.64 trillion in spending, an increase of 4.1 percent from projected fiscal 1996 spending. He projects a $160.6 billion deficit in fiscal 1997, up 4 percent from this year's estimated shortfall.

The plan, using assumptions from the Congressional Budget Office, would cut back the growth in Medicare by $214 billion, Medicaid by $59 billion, welfare by $40 billion and discretionary programs by $297 billion through 2002. Administration officials said the package of middle-income tax relief now totals $99 billion, up $5 billion since January.

THE NEW YORK TIMES
WEDNESDAY, JULY 3, 1996

Foreign Affairs

THOMAS L. FRIEDMAN

The Oil Factor

WASHINGTON

The most striking thing about the response of the G-7 leaders to the latest bombing in Saudi Arabia was the decision they didn't take. Yes, they called for an unstinting effort to track down and punish the perpetrators, and that's essential. But an equally obvious response didn't seem to occur to them — that the Western industrial democracies should also reduce their energy consumption and reliance on imported Middle East oil, which would be healthy for their economies, healthy for the environment, and make it so every bomb that goes off in Saudi Arabia doesn't become a world historical event.

The absence of such a recommendation from the Group of Seven economic summit is all the more striking because the very reason the G-7 was founded was to deal with the economic fallout and currency disruptions set off by the 1973 oil shock.

Why we worry about Saudi Arabia.

In a way, it is a signal of the G-7's ultimate irrelevance. It has forgotten what it was founded to do. There was a revealing headline in The Financial Times last week from the Lyons G-7 summit. It blared: "G-7 to Prepare Anti-Terrorism Measures." It was like reading: "World Renowned Chefs to Fix Plumbing." It's not exactly their specialty.

But the indifference of the G-7 leaders to oil conservation is typical of the mood these days, certainly in the U.S. We responded to the 1973-79 oil crises by raising taxes on gasoline to reduce consumption. Now we are lowering those taxes. We responded to the 1973-79 crises by shrinking the size of automobiles; now we are upsizing them. We responded to the 1973-79 crises by lowering the speed limits; now we are raising them. To put it in numerical terms, before 1979 the U.S. was importing about 45 percent of its oil. After 1979, as conservation really kicked in, oil imports fell to 32 percent by 1985. Since then, imports have steadily crept up, topping 50 percent last year.

It is as though 1973-79 never happened, and for a lot of people it didn't. Robert Hormats, the Goldman Sachs international economics expert, told me that he was called the other day by a TV network to comment on the Saudi bombing, and when the young woman booking him for the show asked what he thought, he began talking about the potential for another oil shock. "Oh yeah," the young woman responded, "my mom told me there once were gasoline lines." Ancient history.

What's sad is that technological improvements in the oil industry over the last decade have greatly expanded non-OPEC and non-Middle Eastern oil production, creating a much greater opportunity for the U.S. and others to become less dependent on Persian Gulf crude — if we were more conservation minded. One innovation, called three-dimensional seismic exploration, is like an M.R.I. scanner. It has given oil companies an M.R.I.-like look at the subsurface of the earth, in a way that has allowed them to find pockets of oil in places they never could see into before. The other important innovation has been the ability to install offshore oil drilling equipment on floating platforms anchored with cables to the sea bottom, instead of putting the drills on huge, fixed steel towers that have to be built from the sea-bottom to the surface. The new system is cheaper, because it requires less steel, and also allows for easy drilling farther out to sea. That means more oil at lower costs.

It's these innovations that have kept oil prices stable, at between $15 and $20 a barrel, for the past decade, despite global demand that is growing at 2 percent per annum. But ultimately oil is a finite, dwindling resource, and with China becoming more oil-thirsty each year, sooner or later the market is going to get out of balance again. But instead of taking advantage of this current window of opportunity, by slowly intensifying conservation measures, we are instead locking ourselves back into excessive consumption patterns and wasteful infrastructure that will make us more, not less, dependent on Middle East oil by the year 2010.

Make no mistake, Saudi Arabia has been a loyal and important ally of the United States. We should not abandon it now just because a few fringe groups try to drive the U.S. out. But much of what evolves in Saudi Arabia over the next decade will be out of our control. What is in our control is to make ourselves less vulnerable to changes in that desert kingdom, which is far, far away, and about which we understand very, very little. □

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THE NEW YORK TIMES
WEDNESDAY, JULY 3, 1996

Ducking on Affirmative Action

In a hurtful blow to affirmative action in higher education, the Supreme Court said on Monday that it would not hear an appeal by the state of Texas from a lower court ruling that barred public universities from using race as a factor in selecting students. With this sidestepping, the Court left officials in at least three Southern states who are working to open educational opportunities for minorities in an untenable state of uncertainty. It also sowed confusion nationwide — hardly an uplifting way for the Court to finish its term and head into recess. The Court should instead have seized the opportunity to reject the lower court's flawed pronouncement and reaffirmed its historic commitment to carefully designed affirmative action.

The high court seemed insensitive to the long history of racism at the University of Texas Law School, whose affirmative action program was challenged by rejected white applicants, giving rise to the case. As late as 1971, the law school admitted no black students. The Court also ignored the Clinton Justice Department, which filed a brief warning that the "practical effect" of the lower court's holding "will be to return the most prestigious institutions within state university systems to their former 'white' status."

The refusal to hear the case left standing a ruling by the United States Court of Appeals for the Fifth Circuit that caused justifiable consternation in the academic world three months ago. An appellate panel invalidated a special admissions program at the Texas law school aimed at increasing the number of black and Mexican-American students. In doing so, the panel took the gratuitous, additional step of declaring the Supreme Court's landmark 1978 affirmative action decision in the so-called Bakke case no longer good law. That case, involving a suit by a rejected white applicant who sought entry to a California state medical school, resulted in a ruling that barred the use of quotas in affirmative action plans but permitted universities to use race as a factor in choosing among applicants to serve the "compelling interest" of creating a diverse student body.

If Bakke is no longer good law, it is for the Supreme Court to declare. But instead of grabbing the case to reassert Bakke's sound principle, the justices found a way out in the odd posture of the case. In an unusual one-paragraph opinion that was also signed by Justice David Souter, Justice Ruth Bader Ginsburg said that the Court was denying review because the case did not actually present a live controversy. The kind of two-track admissions system that inspired the legal challenge is no longer used or defended by Texas, she explained. Like most other colleges and universities, the University of Texas Law School now uses a single applicant pool, in which race is one factor to be considered among others in choosing among the qualified.

Justice Ginsburg's message, a welcome one, was that the Court's refusal to hear the case should not be read as an endorsement of the Fifth Circuit's analysis. But, in fact, there was a remaining live controversy before the Court in the Fifth Circuit's direction to a state's leading law school to completely exclude race as a factor in future admissions. The shame is the Court declined to address it.

Instead, the Court left behind a mess. Its refusal to hear the case has put educational institutions in the three states that make up the Fifth Circuit — Texas, Louisiana and Mississippi — in a terrible spot. They could face punitive damages if they fail to change their practices to conform to an ill-considered ruling that may ultimately be judged an incorrect statement of the law.

Nervous educators elsewhere in the nation can find some comfort at least in Justice Ginsburg's benign explanation. Eventually, this equal rights battle will find its way back to the Supreme Court. Meanwhile, it is premature to give up on affirmative action programs still needed to blot out historic racial bias and promote educational diversity.

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a more accurate criterion for making policy decisions than other, non-racial characteristics.

III
"PEEKING" AND OTHER VICES OF COLORBLINDNESS: *SHAW V. RENO*[71]

The most difficult problem of the colorblind principle is raised by "peeking," when social actors use race covertly in making decisions. The potential for racial injustice exists when decisionmakers at all levels consider race covertly; it also exists when courts and legislatures decide who should be allowed to consider race covertly. The Supreme Court's controversial decision in *Shaw v. Reno* presents this issue clearly.

It is no accident that the nomination of Lani Guinier to be Assistant Attorney General for Civil Rights was blocked by a coalition of people concerned about voting rights issues.[72] A series of court battles over the years has created a stir about voting rights and black voters. The key concern seems to surround the 1982 amendments to section 2 of the Voting Rights Act,[73] which eliminated the previously required showing of intent to discriminate in voting rights suits under the Supreme Court's test in *City of Mobile v. Bolden*.[74] In 1986, the Supreme Court in *Thornburg v. Gingles*[75] held that blacks and other racial minorities must be given the opportunity to challenge legislative decisions that substantially reduce their chances of election.

In 1992, these legal developments, together with the reapportionment of congressional districts in 1990, led to the largest number of African Americans and Hispanics ever elected to Congress.[76] The number of black congresspersons increased from twenty-six to thirty-nine, and the number of Hispanic congresspersons rose as well.[77]

[71] 113 S. Ct. 2816 (1993).

[72] See Patricia J. Williams, Lani, We Hardly Knew Ye, The Village Voice, June 15, 1993, at 25 (discussing myth that Guinier was a "quota queen").

[73] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 (codified at 42 U.S.C. § 1973 (1988)).

[74] 446 U.S. 55 (1980).

[75] 478 U.S. 30 (1986) (applying amended § 2 of Voting Rights Act to vote-dilution claim involving multimember districts).

[76] One of the most interesting aspects of *Shaw* is its complete neglect of this history. No mention is made in Justice O'Connor's opinion that the new district in North Carolina elected the first black representatives to Congress in almost a century or that the 1982 amendments to the Voting Rights Act had the desired result of increasing the opportunities of African Americans and Hispanics to seek and win congressional seats.

[77] See Maria Puente, Hispanics Debating Their 'Destiny' in USA, USA Today, July 16, 1993, at 10A (reporting increase in number of Hispanics to nineteen); Monte R. Young, Feeling Their Votes Black Caucus Gains Clout in Congress, Newsday, Sept. 20, 1993, at 19

Some of the newly elected African American representatives came from districts that had been deliberately reapportioned to produce African American majorities. Some of these districts were shaped oddly[78] in order to meet the apportionment requirements of the Supreme Court as laid out in *Reynolds v. Simms*[79]. Two of the newly redrawn districts in North Carolina elected an African American to Congress. When Melvin Watt and Eva Clayton took the oath of office in January 1993, they became the first African Americans to sit in Congress from North Carolina in nearly a century.[80]

The Wall Street Journal described the congressional district in which I vote, the one that stretches along I-85, as "political pornography."[81] This Twelfth Congressional District, the one at issue in *Shaw*, runs from Durham, along I-85, to Charlotte. In some places, the district is the width of the highway. The United States Attorney General had previously invoked his power under the Voting Rights Act[82] to reject an earlier plan produced pursuant to the 1990 redistricting. He suggested that although the state should have produced two districts that were predominantly minority in order "to give effect to black and Native American voting strength in this area,"[83] the original plan had produced only one. North Carolina decided not to appeal this use of federal power and instead produced the requested second black majority district. Five white residents of Durham then challenged this

(reporting that number of blacks in Congress is forty, including not-fully-voting member from District of Columbia).

[78] I say "oddly" somewhat advisedly. The districts were no more odd than some of the other districts created by a court that requires almost absolute precision in district drawing and by legislatures that redistrict to maximize partisan advantage and incumbency. Computers permit legislatures to include more factors in their analysis. See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 100-02 (E.D.N.C. Aug. 1, 1994) (describing new capabilities for redistricting provided by technological developments). It is, therefore, hard to say that the choices made by legislatures differ impermissibly from choices based on race.

[79] 377 U.S. 533, 568 (1964) (holding that equal protection clause requires that state legislative districts be apportioned on population basis); see also Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (holding that under article I, § 2, congressional districts must be apportioned on population basis).

[80] William M. Welch, Wild Card in N.C. Elections: The Courts, USA Today, May 2, 1994, at 2A.

[81] See Review & Outlook: Political Pornography, Wall St. J., Sept. 9, 1991, at A10; Political Pornography II, Wall St. J., Feb. 4, 1992, at A14. I am tempted to suggest that the Wall Street Journal does not understand politics and has never seen pornography. The attitude reflected in the quotation demonstrates the poverty of the colorblind principle as applied by the Supreme Court in *Shaw*. Those who seek a useful definition of pornography, might look instead to James Lindgren, Defining Pornography, 141 U. Pa. L. Rev. 1153, 1221-22 (1993) (examining importance and difficulty of properly defining pornography).

[82] See 42 U.S.C. § 1973c (1988).

[83] *Shaw*, 113 S. Ct. at 2820 (citations omitted).

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second district in federal court, alleging that the district was an unconstitutional gerrymander under the fourteenth amendment.[84]

Justice O'Connor concluded that the plaintiffs had been affected adversely by North Carolina's use of race-conscious redistricting to create a black voter majority.[85] She explained that these five white plaintiffs were not claiming a dilution of white voter strength, or even claiming to be white; they were just "citizens" adversely impacted by being unable "to participate in a 'color-blind' electoral process."[86] Just citizens? What angered my colleagues (two of the five plaintiffs teach law at Duke University School of Law) and led them to fight this case long past the point when the expense might have deterred others, was not the shape of the district, but the fact that race was taken into account.[87]

The Court is caught in a box of its own making and does not understand the nature of the dilemma it has created. The Court first says that we must make no assumptions about how particular groups will vote, and that it therefore will not peek at the reality of racial bloc voting in North Carolina.[88] If that is true, however, then these districts cannot possibly violate the rights of the white plaintiffs because the decisions that the redrawn districts produce could not be discriminatory. If these plaintiffs have no race, then how can race matter? The Court claims that it wants to make no invidious assumption about the way that black voters will vote. If indeed black voters vote like everyone else, without regard to the racial identity of the candidates, then how could the rights of the five white plaintiffs have been injured? What is the injury to citizens who have no race?

[84] Id. at 2821.

[85] See id. at 2828. A particularly bewildering aspect of Justice O'Connor's decision is her failure to acknowledge that these districts could elect white candidates without any change in the current pattern of black and white voting because the two districts only barely achieve black majorities. White candidates are still likely to win at least some elections in the challenged district. See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 140 (E.D.N.C. Aug. 1, 1994) (noting narrow African American majority and election of three white candidates in districts with minority-race voting majorities); see also note 100 infra. As Lani Guinier has pointed out, these are the two most integrated districts in the state. See Guinier, supra note 11, at 1590.

[86] *Shaw*, 113 S. Ct. at 2824.

[87] See Shaw v. Hunt, No. 92-202-CIV-BR, slip op. at 23 (E.D.N.C. Aug. 1, 1994) (citing claim by two plaintiffs that they are injured by redistricting because they doubt quality of their representation and feel "'disenfranchised.'").

[88] "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . . ." *Shaw*, 113 S. Ct. at 2832.

The reason the Court wants to treat these five white plaintiffs as raceless is to avoid the difficulty of admitting that there is no injury.[89] Instead, the decision states that these plaintiffs have a right to live in a colorblind world, where redistricting does not upset their racial expectations. Despite Justice O'Connor's effort to claim that such a world is possible, she does not and cannot suggest how the State of North Carolina might actually achieve race-neutrality, given the myriad of redistricting policies that implicitly take account of race.[90]

Indeed, Justice O'Connor attempts to distinguish between permissible peeking and impermissible peeking. She points to the political redistricting in *Wright v. Rockefeller*[91] as an example of legitimate peeking in the legislative process.[92] The comparison implies that attention to race is legitimate in order to realize "compact" and "contiguous" districts, or the continuance of the integrity of political subdivisions.[93] Yet, the legislatures' attention to race so as to create black majority districts is impermissible peeking. Justice O'Connor reasons that such districts constitute impermissible peeking because districts with irregular shapes give the appearance of unfairness and appearance ought to matter.[94] Appearance matters because "[i]t rein-

[89] Perhaps Justice O'Connor was trying to fashion an argument for standing similar to the one articulated by Justice Thomas in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 113 S. Ct. 2297 (1993). As Justice Thomas explained in that case:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Id. at 2303. The problem with applying this standing argument to *Shaw* is that, unlike a contracting process whereby some competitor is excluded, in the voting rights context no white candidate is excluded. Indeed, if the Court is right that there is no such thing as racial-bloc voting, white candidates have just as good a chance of winning as black candidates. The injury to the five white plaintiffs is the same as if, for example, the State had divided Durham into several districts, thus reducing the chances that someone from Durham could be elected. Could a group of Durham people challenge the redistricting program because as a group they were adversely affected? I think not. The real injury that the Court refuses to acknowledge is the blow to white supremacy.

[90] Justice O'Connor writes:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . . *The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.*

Shaw, 113 S. Ct. at 2826 (second emphasis added) (citations omitted).

[91] 376 U.S. 52 (1964).

[92] *Shaw*, 113 S. Ct. at 2826.

[93] Id.

[94] See id. at 2826-27.

forces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which the[y] live—think alike, share the same political interests, and will prefer the same candidates at the polls."[95]

The risk that Justice O'Connor runs is, of course, that her view can be interpreted as a call for enforced white supremacy. The traditional enforcement of race-neutral standards in drawing political districts—like age, education, and economic status—has left North Carolina without a black congressional representative for over a century, even in a state that still has a significant number of counties covered by the Voting Rights Act.[96] Justice O'Connor, recognizing the difficulty of her position with respect to this issue, responds in two different ways. First, she argues that the creation of such districts sends the wrong message to congresspersons elected from those districts by suggesting that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[97] Second, she contends that the Court's prior gerrymandering decisions apply a similar principle of prohibiting racial peeking to *exclude* blacks in redistricting.[98] Both arguments demonstrate that the Court will manipulate doctrine to avoid the racial implications of its decisions.

Justice O'Connor's contentions about the destructive impact of peeking are invalid on a number of grounds. She cannot support her argument with any empirical evidence to suggest that members of Congress elected from a majority black district ignore their white constituents. Her argument is particularly wrong-headed when the white minority still retains substantial control over the choice of representatives, as is the case with both of the North Carolina districts at issue (as well as districts in other states under challenge after *Shaw*).[99] Indeed, the fact that white candidates ran in both of these districts indicates that whites obviously believe they can still win in such a district (which, given its barely 50% black population, is better described as a racially integrated district than a black-majority one).[100] Justice O'Connor ignores the power that greater wealth and superior political connections provide to white communities in these districts, power that continues to influence the representatives they elect to Congress. In at least one congressional election, white voters cast the votes that decided which of two black candidates would represent an overwhelmingly white district.[101]

[95] Id. at 2827.

[96] Section 5 of the Voting Rights Act of 1965 requires certain "covered" jurisdictions—mainly those in the South—to obtain judicial or administrative preclearance before enforcing any new voting qualification, standard, practice, or procedure with respect to voting. See 42 U.S.C. § 1973c (1988).

[97] *Shaw*, 113 S. Ct. at 2827.

[98] Id. at 2826-27; see Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (ruling that municipal boundaries that excluded blacks entirely could be challenged under fifteenth amendment); id. at 349 (Whittaker, J., concurring) (arguing that judgment should be based on equal protection clause of fourteenth amendment).

[99] Suits have been filed challenging other districts that have elected black congresspersons in Texas, Louisiana, Florida, and Georgia. See Ana Puga, Minority Electability at Stake in N.C. Trial, Boston Globe, Apr. 4, 1994, at 6. Only one of these suits has been decided. See Hays v. Louisiana, 839 F. Supp. 1188, 1209 (W.D. La. 1993) (finding z-shaped district unconstitutional "racial gerrymandering"), vacated and remanded, 114 S. Ct. 2731 (1994). The Supreme Court stayed the lower court's decision on remand pending appeal. 1994 U.S. LEXIS 5207 (Aug. 11, 1994).

[100] See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 140 (E.D.N.C. Aug. 1, 1994) ("[T]he two districts have but narrow African-American voting majorities: in the First District, 50.5% of the registered voters; in the Twelfth District, 53.5% of the registered voters.").

[101] See Thomas B. Edsall, Whites Learn Minority Politics Like Any Other Group's, Their Support Can Be Crucial in a Tight Race, Wash. Post, Nov. 2, 1986, at C2 ("In the Atlanta congressional fight between civil rights leaders John Lewis and Julian Bond, Lewis, who in the past had run on the local 'Black Slate,' this year pointedly ran on 'the people's slate.' *Lewis won because of the strong majorities he received in the white community.*") (emphasis added). Indeed, some have suggested that the need to create cross-racial coalitions has the potential to break down the racial divide because if the bloc vote is divided between two candidates, the white vote becomes decisive, and the candidate with the "coalition" platform will generally win:

> While biracial coalitions are emerging in both parties, they are likely to have far more impact on the Democrats. The restored importance of whites in majority black districts and cities has the potential to ameliorate the racial tensions that have severely undermined the Democratic Party coalition in the South and in urban centers of the North.
>
> The resurgence of white voting strength is forcing politicians to adopt biracial elective strategies, lessening racial tensions. This, in turn, should have the effect of slowing the steady drift of whites in many southern communities to the Republican Party.
>
> "This brings whites back into the ball game," a Democratic consultant said. "When politics is all black, then the whites are going to move over to the Republican Party. This way, they get a piece of the action. It's black action, but still, whites have a piece of it."
>
> . . . .
>
> "It can be argued that blacks are not getting their premier choice," said Williams of the Joint Center, "but in a sense, it seems that whites are doing what blacks have done for years."

Id; see also Luix Overbea, Black Caucus Hopes to Increase Its Numbers in U.S. House, Christian Science Monitor, Nov. 8, 1988, at 5 (reporting that most black incumbents in predominantly black districts are confident of victory, but some black candidates seeking new seats need white votes); Paul Ruffins, Interracial Coalitions' "New Moderation" Doesn't Account for the Dramatic Gains That Black Politicians Made in the Last Elections, Atlantic, June 1990, at 28, 30:

> The point is that there is no new, more moderate generation of black politicians. Most have been moderate all along. There have been angry civil-rights leaders and black activists, but the angry black politician is a stereotype of conservatives. "What I think happens," Congressman Ed Towns, of Brooklyn, recently told me, "is that peo-

The Court's argument ultimately assumes that when whites are in power because of politically-determined (and race-infected) policies, it is constitutional, but when those majorities are redefined through race-conscious measures, it is not. The *Shaw* decision, in effect, asserts that existing political majorities are race-neutral, and therefore it enforces the status quo. Justice O'Connor allows legislatures to "peek" as long as they do not violate the white supremacy existing in North Carolina.

Her position is revealed clearly when she cites nonracial examples of legitimate considerations in redistricting.[102] She assumes that political subdivisions can somehow be achieved neutrally. In fact, Durham County is a direct product of Reconstruction Era opposition to black political control of Orange County, out of which Durham was created. No one who has lived through a political annexation fight in the South believes that those decisions are made free of race- and class-based interests. All five plaintiffs live in a racial atmosphere pervaded by this history. Similarly, the assertion that "compactness" or "contiguousness" are themselves non-subjective concepts assumes that the white majority is race-neutral, when we know that the legislature often manipulates these standards so as to create congressional majorities that just happen to be white. It may be that these white-majority districts can be deemed race-neutral. But, if so, then the same assumption must be applied to the black-majority districts at issue in *Shaw*.

Similarly, Justice O'Connor's contention that she has continued a tradition of race-neutral jurisprudence in her ruling is wrong. She reaches this conclusion only by distorting the Court's opinion in *Gomillion v. Lightfoot*.[103] In *Gomillion*, the City of Tuskegee created an "uncouth," twenty-eight-sided municipal boundary that excluded all but four or five of the 400 black voters and none of the white voters.[104] The purpose of the exclusion was to limit services and other benefits principally to the white populace.[105] Losing city services in a largely rural county is a significant issue. Justice O'Connor's invocation of *Gomillion* to create symmetry between the Court's treatment of blacks and whites in districting questions suggests a serious misun-

ple confuse black politicians with black civil-rights leaders such as Martin Luther King and Stokely Carmichael, most of whom never ran for anything."

[102] See *Shaw*, 113 S. Ct. at 2826.

[103] 364 U.S. 339, 341 (1960) (ruling that municipal boundaries that excluded blacks entirely could be challenged under fifteenth amendment); id. at 349 (Whittaker, J., concurring) (arguing that judgment should be based on equal protection clause of fourteenth amendment).

[104] Id. at 340-41.

[105] Id.

derstanding of the reality that precipitated *Gomillion*. O'Connor's lifeless recitation of the facts of that case reads as if written by law clerks out of a hornbook. She refers to Tuskegee only as a municipality or "the city," and she misses the crucial point that in *Gomillion none* of the white voters were excluded.[106]

In actuality, the Court in *Gomillion* might well have concluded that the City of Tuskegee's redistricting plan constituted impermissible racial peeking precisely because a powerful, entrenched white power structure had made a conscious effort to deny blacks their right to participate in the political system. If so, then the plaintiffs in *Shaw* bear a much stronger resemblance to *Gomillion*'s *defendants* than to its *plaintiffs*. Like the defendants in *Gomillion*, the *Shaw* plaintiffs insist on whites keeping control of the political process. Justice O'Connor and a majority of her colleagues permit the white plaintiffs in *Shaw* to make a case without ever having to prove a concrete injury; unlike the plaintiffs in *Gomillion*, the *Shaw* plaintiffs have not been deprived of anything.[107]

The Court's anxiety for the rights of my colleagues in *Shaw* was, unfortunately, not in evidence two terms ago when the real right of voter participation was altered by political theft. In *Presley v. Etowah County Commission*,[108] the Court refused to find a violation of the rights of black voters in Alabama under section 5 of the Voting Rights Act.[109] Black voters in Etowah County had challenged successfully the electoral districts for county commissioners and thereby succeeded in electing a black representative to the County Commission.[110] In response to that election, four holdover members of the commission transferred the most politically important duties of the commissioner to another office, effectively denying the black representative any power.[111] The Court said that this divestment did not constitute a change "with respect to voting" under section 5, and thus

[106] The fact that no white voters were excluded in *Shaw* makes it clear that it was white supremacy, and only white supremacy, that was at stake in *Gomillion*. The City of Tuskegee was unwilling to sacrifice even one white family to the ignominy of a black district. Whatever is happening in *Shaw*, it is not a form of the total exclusion evident in *Gomillion*.

[107] See Guinier, supra note 11, at 1593:

> By this definition, the majority in Shaw misuses the term gerrymandering to describe a 54% black district that, as the majority concedes, was drawn to remedy a century of racial exclusion and that, as the majority also acknowledges, did not arbitrarily enhance or diminish the political power of any group.

[108] 112 S. Ct. 820 (1992).

[109] 42 U.S.C. § 1973c (1988).

[110] *Presley*, 112 S. Ct. at 822.

[111] Id.

did not need to be reviewed and precleared by the federal court or the United States Attorney General.[112]

Comparing the claims advanced by my colleagues and those by the black plaintiffs in *Presley*, it is difficult to see how the injury to the five white plaintiffs in *Shaw* could be deemed more significant constitutionally. After all, the constitutional interests in *Presley* require the least judicial gamesmanship to protect. They are a product of the Congress's power to enforce statutes under the fourteenth and fifteenth amendments to prevent discrimination in voting.[113] The Court nevertheless held that the voting rights statute, meant to protect black voters from just such political theft, did not provide a meaningful avenue of attack.[114] Yet in *Shaw*, "citizens" without a race, and parties without any article III injury, were found to have been aggrieved by North Carolina's race-conscious remedy.[115]

In describing the Twelfth District of North Carolina, Justice O'Connor cited to the dissent in the district court case,[116] the amicus brief of the Republican National Committee,[117] and a comment by a state legislator reported in the Washington Post that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district."[118] The last was clearly a joke.[119] But the Court was so intent on vilifying this minority-majority district that it seemed to miss the humor in the description and instead took the statement seriously. The question of how to use race in fashioning remedies is an important one, and one on which Justice O'Connor and I are likely to disagree. But there is no doubt that the question deserves more

[112] Id. at 832.

[113] See U.S. Const. amend. XIV, § 2 (allowing for proportional reduction in representational power when portion of a state's citizens are denied right to vote); id. § 5 (granting Congress enforcement powers); id. amend. XV, § 1 (prohibiting discriminatory abridgement of citizens' voting rights); id. § 2 (granting Congress enforcement powers).

[114] *Presley*, 112 S. Ct. at 832 (holding that county's changes did not violate § 5 of Voting Rights Act).

[115] I am waiting for this Court to extend its policy to any issue that black plaintiffs might raise in constitutional discourse. I am willing to bet that as long as the current majority on the Court exists, no black plaintiff will ever get standing to challenge a decision of a municipality or state based upon this principle of violation of constitutional right.

[116] *Shaw*, 113 S. Ct. at 2821 (stating that district "winds in snake-like fashion . . . 'until it gobbles in enough enclaves of black neighborhoods'" (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part))).

[117] Id. (citing Brief for Republican National Committee as Amicus Curiae at 14-15, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357)).

[118] Id. (quoting Joan Miskupic, N.C. Case to Pose Test of Racial Redistricting, Wash. Post, Apr. 20, 1993, at A4.)

[119] The Washington Post story reported the statement this way: "State Rep. Mickey Michaux often joked about the meandering North Carolina 12th Congressional District that happened to track Interstate 85: 'If you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" Miskupic, supra note 118, at A4.

serious attention from the Court than Justice O'Connor gave it in *Shaw*. In the final analysis, the plaintiffs have attempted to argue that the use of race-consciousness by the legislature is inappropriate if the result is to produce districts that would help black candidates. The Court accepted that argument and contended that a race-neutral policy must be applied.[120]

It is clear, however, that the legislature can and will continue to peek at race in making redistricting policy.[121] The only way to prevent such peeking would be if all information about race and party were excluded from the deliberations. But such exclusion is not required and, as a practical matter, will not occur. The race of the voters matters in North Carolina precisely because the black voters have voted consistently against the racial politics of North Carolina's Congressional Club[122] and Republican Party. Saying that the legislature has created racial divide in North Carolina, given the history of racist campaign appeals by white candidates,[123] is an insult to black voters.

Indeed, the *Shaw* case has nothing to do with race neutrality and everything to do with partisan politics. Republicans have joined in litigation over race-conscious districting in the hope of forcing state legislatures to concentrate the black vote in urban districts, leaving the white suburbs more heavily Republican.[124] This interest convergence

[120] See *Shaw*, 113 S. Ct. at 2830-32.

[121] As Justice O'Connor herself points out, a legislature is always "*aware* of race when it draws district lines, just as it is aware of age, economic status, religious and. . . a variety of other demographic factors." Id. at 2826.

[122] The Congressional Club is a political action network in North Carolina that has been the principal support for Senator Jesse Helms. See Alan McConagha, Inside Politics, Wash. Times, Feb. 23, 1994, at A7 (noting that Club proclaims itself "'[f]ounded in 1973 to support Senator Jesse Helms and the conservative cause'").

[123] For example, the Jesse Helms campaign sent an election eve mailing intended to intimidate black voters away from the polls in the 1990 senatorial race against black candidate Harvey Gantt. See Helms Campaign Signs Decree on Racial Postcards, N.Y. Times, Feb. 28, 1992, at A18 (reporting that Helms campaign signed consent decree to settle Justice Department charge of intimidating black voters). It is difficult not to see the *Shaw* challenge to the 1990 districting plan as part of a larger scheme to "take back" political power in the City of Durham. In October of 1991, Chester Jenkins, Durham's first black mayor, see Bill Nichols, Agenda, Politics Different for Newest Black Mayors, Gannett News Service, Apr. 3, 1990, available in LEXIS, News Library, Arcnws File, was defeated, see Myron Struck et al., From the Field, Campaigns & Elections, January 1992, as part of a conservative attack on the black political establishment. Despite the fact that Durham is over 45% black, see Bureau of the Census, U.S. Dep't of Commerce, 1990 CP-1-35, General Population Characteristics, at 35 tbl. 6 (1990), blacks historically have exercised little political control. *Shaw*'s effort to require "race neutrality" can be read as part of a larger scheme to restore this imbalance of political power.

[124] See GOP, Minorities Share Redistricting Agenda, Chi. Trib., Apr. 25, 1991, at C32 (noting that Republicans favor new minority-dominated districts because their own candidates become more competitive once surrendering districts are stripped of Democratic minority voters).

between black voter advocates and the GOP may seem to indicate that the sole concern in districting is race, but this interpretation is wrong: race is only one factor in redistricting cases.[125] When North Carolina gained a congressional seat after the 1990 census, many Republicans thought that seat should have belonged to them. The fact that the North Carolina legislature was able to create two districts that could elect a black congressperson without at the same time reducing the total number of districts likely to remain Democratic seemed to anger many Republicans in the state.[126] Their claim was not, of course, that they could not vote, or that there were too many black districts (after all, the North Carolina General Assembly created the second black-majority district only after a Republican Attorney General had refused to approve the first plan with only one black-majority district),[127] but that their own partisan interests had been injured. The five plaintiffs in *Shaw* were Democrats, but their challenge to this particular district is likely to benefit Republicans, if anyone.[128]

The biggest problem with the Court's argument for colorblindness is that no factors that a redistricting plan might consider are truly race-neutral. For example, any plan that considers whether a district is likely to vote Democratic can generally use such information as a proxy for race. No procedure—not even geography—is completely raceless.[129] Furthermore, all "colorblind" methods for drawing congressional districts will tend to enforce the status quo, insofar as blacks can be elected to Congress only if they are able to convince a disproportionately large number of whites to vote for them.[130]

[125] The majority opinion in *Shaw* cites Bernard Grofman, Would Vince Lombardi Have Been Right If He Had Said: "When it Comes to Redistricting, Race Isn't Everything, It is the *Only* Thing"?, 14 Cardozo L. Rev. 1237 (1993). See *Shaw*, 113 S. Ct. at 2821. However, the last sentence of Professor Grofman's article says: "Thus, Vince Lombardi would have been wrong if he had said: 'With respect to redistricting, race isn't everything, it's the *only* thing.'" Grofman, supra at 1276.

[126] This anger seems to prove Professor Grofman's point that, "[t]he view that Republicans are seeking to use the Voting Rights Act for partisan gain—a view that is accurate—must not be confused with the much stronger claim that the Republicans have actually been able to use the Voting Rights Act in that way." Grofman, supra note 125, at 1256.

[127] See *Shaw*, 113 S. Ct. at 2817-18.

[128] Members of the Republican party were permitted to intervene in the case on remand in the lower court. See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 13 (E.D.N.C. Aug. 1, 1994) ("We . . . permitted eleven persons registered to vote as Republicans in North Carolina . . . to intervene as plaintiffs . . . .").

[129] Even geography is problematic if, as is the case in North Carolina, black voters are highly concentrated in a few towns and neighborhoods. Pervasive racial segregation in the United States makes not peeking at race particularly difficult.

[130] Bernard Grofman tries to introduce neutral criteria consistent with his Affidavit in Opposition to District 12, filed in Pope v. Blue, 809 F. Supp. 392, 394 (W.D.N.C. 1992) (dismissing with prejudice Republican challenge to congressional redistricting plan), aff'd, 113 S. Ct. 30 (1992). See Grofman, supra note 125, at 1261. Professor Grofman suggests

Race-consciousness does not, of course, require proportional representation; after all, under such a system the black citizens of North Carolina would be entitled to three representatives, not merely the two that were elected.[131] Justice O'Connor's opinion, however, effectively concludes that a legislature's traditional practice of protecting the constituencies of its (white) incumbents violates no cognizable constitutional right. At the same time, any effort to change that situation affirmatively in order to allow a black candidate the potential to win an office runs afoul of strict scrutiny. Only a Court as hostile to civil rights as the current majority could conclude that the latter effort approximates "political apartheid,"[132] or white supremacist attempts to disenfranchise black voters in the wake of the Civil War.[133] The point is that in a world where race matters, as it does in North Carolina, it is wrong to ignore its effect on our choices.[134] Legislatures

that we ought to use community cognizability as a neutral standard in this context. He suggests that District 12 fails this test. See Grofman, supra note 125, at 1262-63. The truth is that Grofman's notion is arbitrary and nondefinable precisely because it is meant to defend the status quo. In some ways the Twelfth District is easily definable. It encompasses one of the most important economic forces in North Carolina—the east/west highway. It also meets the standard that many other seemingly contiguous districts do not: it is easily traversed. But the problem with Grofman's analysis is more profound than that: it is not necessary. The more "noncognizable" a district is as a community, the more difficult it will be for an incumbent congressperson or a partisan majority to maintain power. Geographically indistinct districts will, therefore, tend to make incumbents beatable any time a controversial issue arises, or make them more responsive to all their constituent's interests.

[131] See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 105 (E.D.N.C. Aug. 1, 1994) (noting that African Americans are 22% of total state population and that North Carolina has total of twelve districts).

[132] See *Shaw*, 113 S. Ct. at 2827 ("A reapportionment plan that includes in one district individuals who belong to the same race, but who . . . may have little in common with one another but the color of their skin, bears . . . an uncomfortable resemblance to political apartheid.").

[133] See id. at 2822-23 (describing states' attempts to circumvent requirements of fifteenth amendment during century following Reconstruction).

[134] Another example of the irresistible temptation to peek at race is the peremptory challenge, despite the colorblind rule of Batson v. Kentucky, 476 U.S. 79 (1986) (holding that state cannot exclude members of jury venire because of race), and its progeny. Take, for example, United States v. Uwaezhoke, 995 F.2d 388 (3d Cir. 1993), cert. denied, 114 S. Ct. 920 (1994). In that case, the Third Circuit upheld a trial judge's ruling that a black woman postal worker was excluded properly on a peremptory challenge despite evidence that the challenge was racially based. In support of its decision, the court stated:

> The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory

peek when they redistrict, and, as is becoming increasingly clear, this Supreme Court peeks when it decides whose rights to protect.[135]

CONCLUSION

The proponents of racial blindness have often viewed race-conscious policies as unidimensional. Even commentators who distinguish between different types of race-conscious remedies do so inconsistently.[136] The Supreme Court seems to have fallen into that trap as well. In a number of its cases involving race, the Court has written about race-conscious policies without adequately distinguishing their uses. There are, however, many kinds of race-conscious policies. As I have defined them, race-conscious policies extend from antidiscrimination policies to fixed numerical requirements. All of these terms of race-consciousness can, in some situations, help to alter the status quo. They use the best proxy we have for race-based disadvantage—race—to try to alter its presence in the body politic. Of course, not all race-conscious policies are born equal, and it is possible for them to backfire. But it is not possible for change to occur without such policies.

The question many of you must be asking is: do we know *how* to use race consciousness to eliminate the status quo? The answer is that it depends on the circumstances. The appropriate race-conscious policy will depend on how deeply entrenched racial subordination is in a particular context. The intersection of race and other issues of oppression, like gender and class, also means that fashioning an appropriate race-conscious policy is more complicated than some have assumed; it requires ultimately that policymakers and judges apply practical policy, instead of simple bright-line rules, to eliminate the consequences of racial subordination.

Traditionally, courts and commentators have assumed that colorblind policies are superior because they are effective policies which will lead to morally just results. If, as I have shown, such a view is incorrect, and if indeed colorblind policies cannot alter the status quo, then Professor Derrick Bell's argument that racism is a permanently entrenched feature of American politics becomes more obvious.[137] If Professor Bell is describing accurately the racial present, this reality is precisely attributable to our refusal to acknowledge that positive change depends fundamentally on race-conscious, not race-neutral, policies.

I should end by pointing out that not all race-conscious policies need to occur through government action. When blacks create communities of influence to alter the existing structure of life, those communities are engaging in a form of race-conscious policymaking. The eradication of the racial present ultimately requires a careful balancing of sophisticated programs that rely neither on the formalism of colorblindness nor on the naive notion that the status quo is easily remediable.

EPILOGUE

When my nephew visits me in the summer, I read to him from a collection of African folktales. One of his favorites is the story of the

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intent as a matter of law. Finally, the prosecutors concluded that if they had their preference (as they did so long as they retained a peremptory challenge), they would rather not have jurors who have had personal experience with drug trafficking. While neither the district court nor the defense attorney pressed the prosecutors to spell out their reasoning, it is possible that the prosecutors may have wanted to avoid jurors with direct drug experience for any number of legally legitimate reasons, the most likely of which is a concern that a personal experience may have left a strong impression on the juror, thus influencing her evaluation of the evidence in a way difficult for the prosecutors to predict.

Id. at 393-94. As the dissent points out, the allegedly race-neutral standard permits the prosecutor to peek at race and claim that something else has motivated the challenge. Id. at 403 (Pollak, J., dissenting). Here, racial peeking resulted in the exclusion of all black people from a jury trying the fate of a black defendant accused of drug trafficking. In the long run, such exclusions are bound to lead to notions of community exclusion. If a black postal worker cannot be seated, then what black person from a poor neighborhood can be? If courts do not want racial peeking, then they should at least require the face and accent of potential jurors to be screened from the lawyers during jury selection. The whole point of the peremptory challenge, however, is to peek at group identity. When people peek, they will use race. For a further discussion of colorblindness and peremptory challenges, see Kenneth B. Nunn, Rights Held Hostage: Race, Ideology and the Peremptory Challenge, 28 Harv. C.R.-C.L. L. Rev. 63, 70-81 (1993).

[135] See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2304 (1993) (granting standing to white contractors to challenge set-aside program for minority contractors without any showing that they would have been awarded the contract in absence of program); Wisconsin v. Mitchell, 113 S. Ct. 2194, 2198-2202 (1993) (upholding enhancement of penalty for black defendant convicted of racially motivated assault and distinguishing *R.A.V.* on ground that the Wisconsin statute involved conduct only, while *R.A.V.* ordinance targeted first amendment-protected speech); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (overturning conviction of white defendant for violating municipal statute prohibiting cross-burning on ground that ordinance discriminated against content-based speech); Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (denying black woman claiming racial harassment protection under 42 U.S.C. § 1981 because statute, despite much conflicting judicial opinion, does not cover post-contract employment relations); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (holding that pattern of job category separation by race did not make out prima facie case of disparate impact discrimination under Title VII); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 498-500 (1989) (invalidating Richmond's set-aside plan for minority subcontractors as lacking compelling governmental interest, despite fact that few black enterprises received city contracts).

[136] See text accompanying notes 23-30 supra.

[137] See D. Bell, supra note 13, at 197-200 (arguing that racism is endemic to American society).

lizard and the turtle. This old African story concerns a lizard who believed in rules. The lizard saw a turtle in the road dragging some fruit attached to the turtle's tail. The lizard jumped on the fruit and claimed it because he had found it in the road. The turtle complained that, since he had harvested the fruit and dragged it along the road, it rightfully belonged to him. The dispute was submitted to the legal authorities. The judges, a group of lizards, came back with the decision that the fruit should be divided in half and given to the two claimants. The turtle felt cheated, but took his fruit home and thought. The next day the turtle waited by the side of the road. When the lizard came by, he jumped on his back and said, "Look what I found!" The lizard complained that he could not possibly belong to the turtle, and they submitted the complaint to the legal authorities. Based upon the previously adopted rule, the authorities ordered that the lizard be divided in half with half to be given to each claimant. The turtle went home happy.

The moral of the story is that formalistic rules seldom lead to justice. The colorblind principle is such a formal rule, and the likelihood that its implementation will lead to justice is just as problematic and contingent. Adjusting color-conscious policies to reflect justice and to achieve our policy goals has the potential to alter the racial present in more appropriate ways.[138]

[138] If we were to analogize this story to the current Supreme Court jurisprudence on race, the results would have been different. If the turtle were black and the lizard white, the Court would have ruled for the lizard in the first action to divide the fruit, and would have said in the second action that we must adhere to our formally adopted rule. The Court, however, would also conclude that the formal rule's application must be left to the sound neutral discretion of a local board of lizards, who should take into account the appropriate prior precedents and policy concerns, including the fact that lizards lie in roads. Indeed, in upholding the lower court's later decision not to divide the lizard in half, the Court might have concluded with language something like this:

> Nothing this Court does today should be construed to indicate that we have at any point failed to adhere to our policy of species-neutrality crucial to the just application of the law. The dissent's suggestion that somehow we have failed to adhere to the requirement that the law be fair to turtles simply ignores our long and successful effort to rid our society of every aspect of discrimination.

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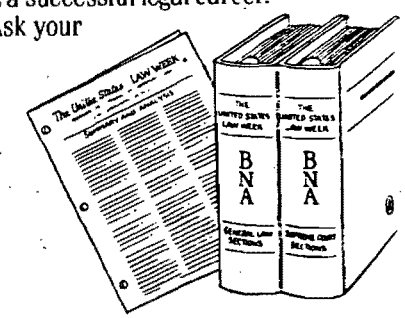

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The United States
Law Week

AFFIRMATIVE ACTION ON THE EDGE

A divisive debate begins over whether women and minorities still deserve favored treatment

Affirmative action is a time bomb primed to detonate in the middle of the American political marketplace. Federal courts are pondering cases that challenge racial preferences in laying off teachers, awarding contracts and admitting students. On Capitol Hill, the new Republican majority is taking aim at the Clinton administration's civil rights record. On the campaign trail, several Republican presidential hopefuls are already running against affirmative action. And in California, organizers are trying to put an initiative on next year's ballot banning state-sanctioned "preferential treatment" based on race or gender.

IN 1990, 62,100 CHARGES WERE FILED WITH THE EEOC. LAST YEAR THE NUMBER WAS 91,200.

This increasingly angry and divisive debate about the role of race and gender in modern America could help the Republicans unseat Bill Clinton in 1996 and change the way many institutions allot jobs, business and benefits. A recent *Wall Street Journal*/NBC News survey found that 2 out of 3 Americans, including half of those who voted for President Clinton in 1992, oppose affirmative action. The *Los Angeles Times* found 73 percent of Californians back the ballot initiative. "The political implications are enormous," says Will Marshall of the Democratic Leadership Council, a moderate group. "Obviously, a lot of Republicans look at affirmative action as the ultimate wedge issue."

The assault on affirmative action is gathering strength from a slow-growth economy, stagnant middle-class incomes and corporate downsizing, all of which make the question of who gets hired—or fired—more volatile. Facing attacks on such a broad front, women's groups, civil rights organizations and other defenders of affirmative action are circling their wagons. Women and minorities still need preferential treatment, they argue, because discrimination still exists, causing blacks and other minorities to lag far behind whites in terms of economic status. "If African-Americans are taking all these jobs," asks Barbara Arnwine of the Lawyers Committee for Civil Rights Under Law, "why is there double-digit unemployment in the African-American community?" Adds Patricia Williams, a professor at Columbia Law School: "There is this misplaced sound and fury about nothing. Access is still very limited, and the numbers are still very low."

But the sound and fury are real. Affirmative action poses a conflict between two cherished American principles: the belief that all Americans deserve equal opportunities and the idea that hard work and merit, not race or religion or gender or birthright, should determine who prospers and who does not. In 1965, Lyndon Johnson defended affirmative action by arguing that people hobbled by generations of bias could not be expected to compete equally. That made sense to most Americans 30 years ago, but today many argue that the government is not

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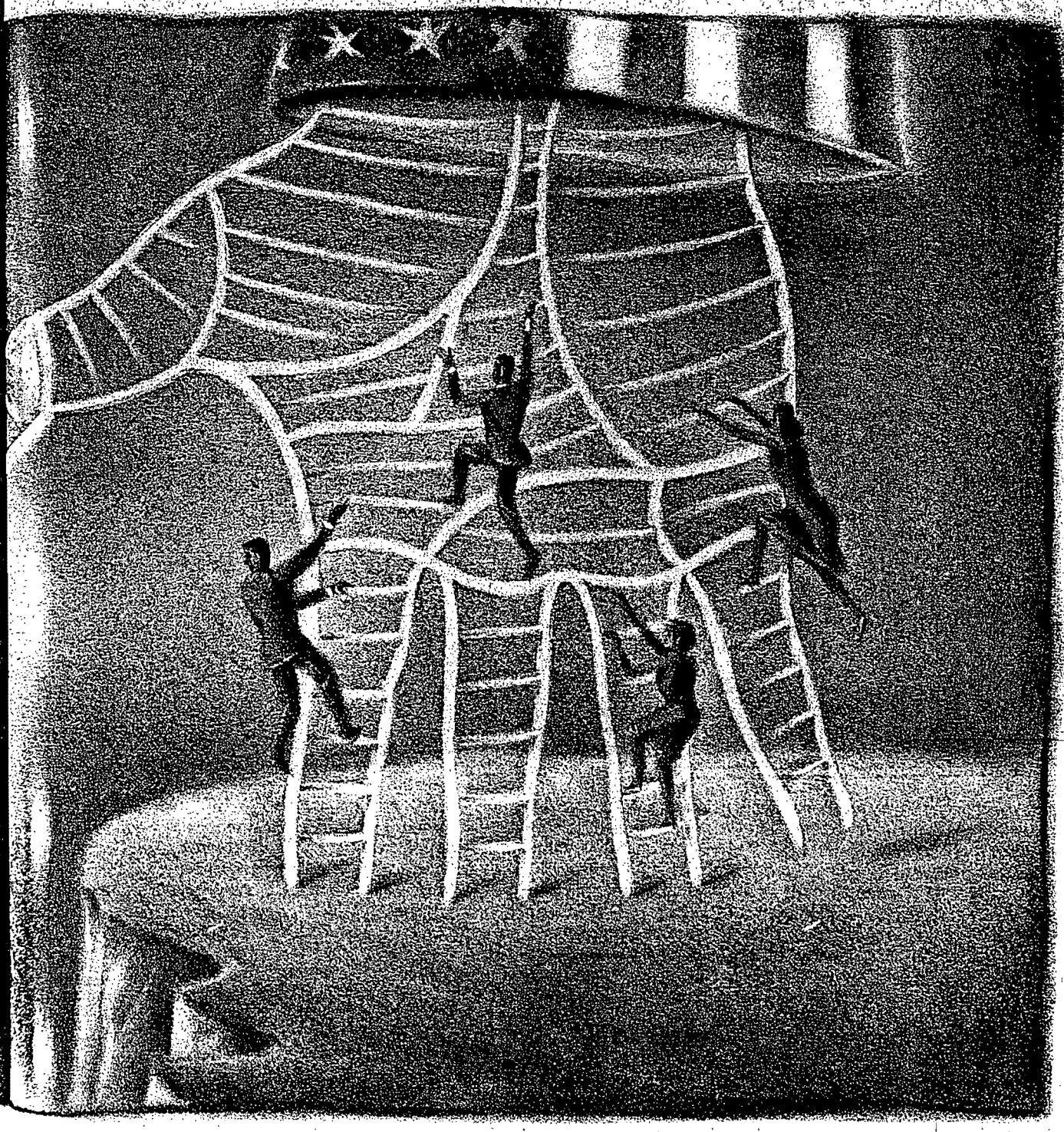

simply ensuring that the race starts fairly but trying to decide who wins it.

Moreover, many women and racial minorities are no longer disadvantaged simply because of their race or gender. Indeed, most of the young people applying for jobs and to colleges today were not even born when legal segregation ended. "I'll be goddamned why the son of a wealthy black businessman should have a slot reserved for that race when the son of a white auto-assembly worker is excluded," says a liberal Democratic lawmaker. "That's just not right."

Disheartening. The critics of affirmative action include some conservative minority and women's leaders who believe it has a destructive effect on their own communities. Thomas Sowell, the black economist, argues that affirmative action has created a process of "mismatching," in which competition for talented minorities is so fierce that many are pushed into colleges for which they are not ready. "You can't fool kids," says Linda Chavez, a Hispanic activist. "They come into a university, they haven't had the preparation, and it's a very disheartening experience for some of them."

Others say affirmative action causes co-workers to view them with suspicion. "White skepticism leads to African-American defensiveness," says Sharon Brooks Hodge, a black writer and broadcaster. "Combined, they make toxic race relations in the workplace." Glenn

PRESERVATION PHOTOCOPY

ILLUSTRATIONS BY SAM HUNDLEY FOR USN&WR

Wh[illegible]orking?

Per[illegible] working or actively seeking work

	White male	White female	Black male	Black female	Hispanic male	Hispanic female
1970	80.0%	42.6%	76.5%	49.5%	NA	NA
1980	78.2%	51.2%	70.3%	53.1%	81.4%	47.4%
1993	76.1%	58.0%	68.6%	57.4%	80.0%	52.0%

NA = Not available. USN&WR - Basic data: U.S. Dept. of Labor

Comparing paychecks

Median annual earnings as a share of white men's

	Black men	Hispanic men	White women	Black women	Hispanic women
1975	74.3%	72.1%	57.5%	53.4%	49.3%
1980	70.7%	70.8%	58.9%	55.7%	50.5%
1985	69.7%	68.0%	63.0%	57.1%	52.1%
1990	73.1%	66.3%	69.4%	62.5%	54.3%
1993	74.0%	64.8%	70.8%	63.7%	53.9%

USN&WR - Basic data: National Committee on Pay Equity

, an economics professor at Boston rsity, says proponents of affirma- :tion have an inferiority complex: n blacks say we have to have affir- : action, please don't take it away ıs, it's almost like saying, 'You're we can't compete on merit.' But I that we can compete."

liam Bennett, former tion secretary and a ıg GOP strategist, ıat "toxic" race rela- aggravated by affir- : action, have led to a ;ing form of re-segre- : "Affirmative action ıt brought us what we –a colorblind society. It has ht us an extremely color-conscious /. In our universities we have sepa- lorms, separate social cen[illegible] s next—water fountains? That's ıod, and everybody knows it."

supporters of affirmative action ıin that arguments like Bennett's ır[illegible]—even naive. "We tried li[illegible]ears ago, and that system ıurally and artificially rigged for males," says Connie Rice of the NAACP Legal Defense and Education Fund. "If we abandon affirmative action, we return to the old-boy network."

Voices on both sides of the debate are starting to discuss a possible compromise that would focus eligibility on class, instead of on race or gender. For example, the son of a poor white coal miner from West Virginia would be eligible for special help, but the daughter of a black doctor from Beverly Hills would not. "Some of the conventional remedies don't work as one might have hoped," says University of Pennsylvania law professor Lani Guinier, whose ill-fated nomination as Clinton's chief civil rights enforcer sparked a storm of protest from conservatives. "Perhaps there is an approach that does not suggest that only people who have been treated unfairly because of race or gender or ethnicity have a legitimate case."

THIRTY YEARS AGO, 18 PERCENT OF BLACK FAMILIES WERE MIDDLE-CLASS. TODAY: 40 PERCENT

No one questions the sensitivity of the subject. For years, the civil rights lobby, backed by Democrats in Congress, was so strong that critics often felt intimidated. Even today, Democrats who disagree with affirmative action are reluctant to voice their doubts. "The problem is political correctness—you can't talk openly," says a member of Congress.

Democrats *are* talking privately, however, urging the White House to formulate a response to the antiaffirmative-action wave before it swamps the president and the party. At the Justice Department, chief civil rights enforcer Duval Patrick is ready: "We have to engage; we can't sit to one side."

But despite the fact that the California initiative could cost Clinton a must-win state in 1996, the administration seems sluggish, even paralyzed. Laments a senior adviser, "We're going to wait until it's a crisis before reacting." White House political strategists admit one reason for the inaction: The issue is a sure loser.

Referee? Caught between angry white males and the party's traditional liberal base, White House advisers think the best they can do is position the president as an arbiter between two extremes. In a recent interview with *U.S. News*, the president voiced his aim this way: "What I hope we don't have here, and what I hope they don't have in California, is a vote that's structured in such a way as to be highly divisive, where there have to be winners and losers and no alternatives can be easily considered." Asked his views on affirmative action, the president tried—as he often does—to please both sides: "There's no question that a lot of people have been helped by it. Have others been hurt by it? What is the degree of that harm? What are the alternatives? That's a discussion we ought to have."

But a senior administration official admits that the middle ground will be an uncomfortable place: "The civil rights groups are going to say we're caving in if we make any compromises. And the Republicans are going to shout, 'Quotas.' " That same tension is already developing within the White House. *U.S. News* has learned that Chief of Staff Leon Panetta is quietly asking friends on Capitol Hill whether the president should simply endorse the California initiative—a position sure to trigger outrage among the president's more-liberal advisers.

Unsure how resolute the White House will be, civil rights groups are looking for their own strategy to defend affirmative action. One of their main jobs, they say, is to debunk the "myth" that unqualified women and minorities are being hired in large numbers. And some of the best salesmen for affirmative action are big corporations that adjusted long ago to the demands for a more-diverse work force, dread bad publicity and fear the uncertainty

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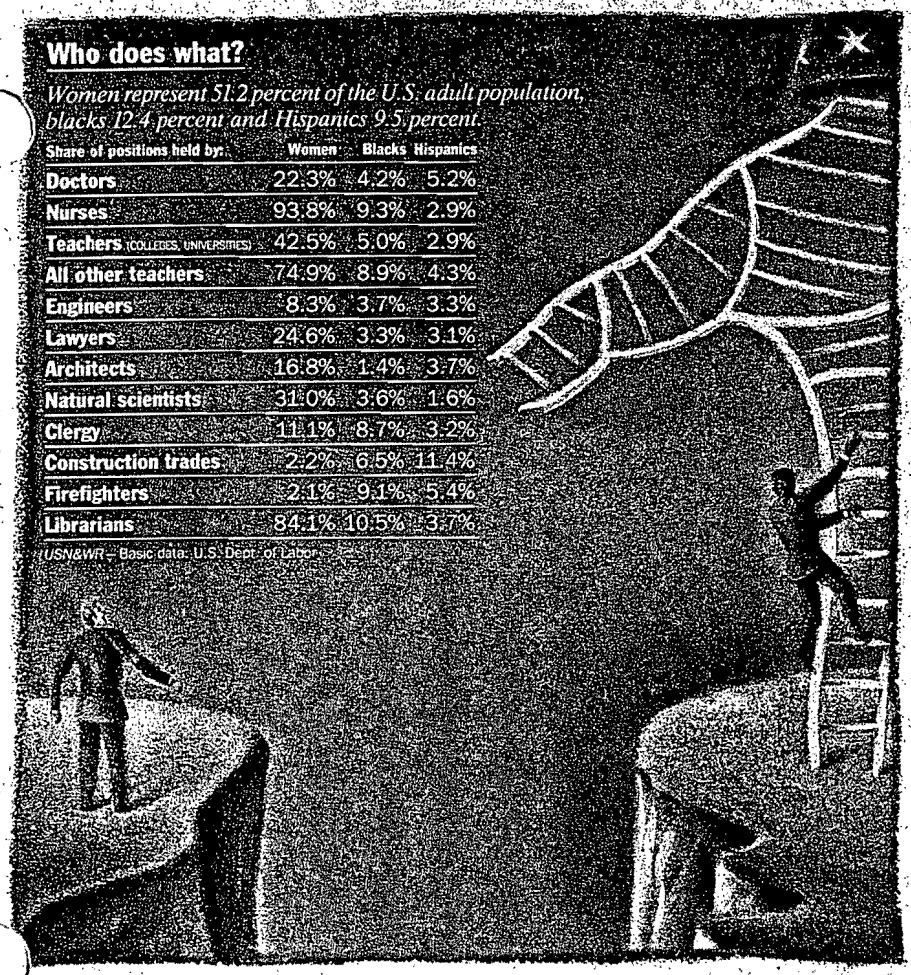
Who does what?

Women represent 51.2 percent of the U.S. adult population, blacks 12.4 percent and Hispanics 9.5 percent.

Share of positions held by:	Women	Blacks	Hispanics
Doctors	22.3%	4.2%	5.2%
Nurses	93.8%	9.3%	2.9%
Teachers (COLLEGES, UNIVERSITIES)	42.5%	5.0%	2.9%
All other teachers	74.9%	8.9%	4.3%
Engineers	8.3%	3.7%	3.3%
Lawyers	24.6%	3.3%	3.1%
Architects	16.8%	1.4%	3.7%
Natural scientists	31.0%	3.6%	1.6%
Clergy	11.1%	8.7%	3.2%
Construction trades	2.2%	6.5%	11.4%
Firefighters	2.1%	9.1%	5.4%
Librarians	84.1%	10.5%	3.7%

USN&WR—Basic data: U.S. Dept. of Labor



change would produce. James Wall, national director of human resources for Deloitte & Touche LLP, a management consulting firm, says diversity is good business: "If you don't use the best of all talent, you don't make money."

Even so, the combination of old resentments, new economic hardships and shifting political winds threatens to explode. "There's a great deal of pent-up anger beneath the surface of American politics that's looking for an outlet," says conservative strategist Clint Bolick of the Institute for Justice. It's the same anxiety that helped pass Proposition 187 in California, which sharply restricts public assistance to the children of illegal immigrants, and thwarted Clinton's plan to push a Mexican aid plan through Congress. "If there is a squeeze on the middle class," says GOP pollster Linda Divall, "people get very vociferous if they think their ability to advance is being limited."

Some African-American leaders insist that this white-male anger is being stirred up by demogogues who make blacks and women into scapegoats. Says Derrick Bell, professor of law at New York University: "There is a fixation among so many in this country that their anxieties will go away if we can just get these black folks in their place."

FIFTY-ONE PERCENT OF WHITES SAY EQUAL RIGHTS HAVE BEEN PUSHED TOO FAR IN THE U.S.

But the anxieties are strong and are coupled with a growing belief that affirmative action is another aspect of intrusive and inefficient big government. "The real back-to-basics movement is not in education but in politics," says William Bennett. "We're rethinking basic assumptions about government."

Accordingly, the fight over affirmative action is playing out in four arenas:

■ **California.** The real question is whether the civil rights initiative will appear on the primary ballot in March of 1996 or on the general-election ballot. If it appears in November, the measure could seriously damage President Clinton's chances to carry the nation's most populous state. That is precisely why national Republicans are promising to raise money for the effort—as long as organizers aim for November.

The initiative is the brainchild of two academics, Tom Wood and Glynn Custred, who say they were alarmed by the prevalence of "widespread reverse discrimination" in the state's college system. The initiative has already attracted some unlikely support: Ward Connerly, a black member of the University of California Board of Regents, said last month that he favors an end to racial and gender preferences. "What we're doing is inequitable to certain people. I want something in its place that is fair." And Hispanic columnist Roger Hernandez wrote: "I've never understood why Hispanic liberals, so sensitive to slights from the racist right, don't also take offense at the patronizing racists of the left who say that being Hispanic makes you an idiot."

California Assembly Speaker Willie Brown, who is black, opposes the initiative as an attempt "to maintain white America in total control." But other Democrats are scurrying for cover. "The wedge potential is absolutely scary," says Ron Wakabayashi, director of the Los Angeles County Human Rights Commission. "The confrontation of interests looks like blacks and Latinos on one side and Asians and Jews on the other."

■ **The courts.** The Supreme Court has generally supported race and gender preferences to remedy past discrimination, but an increasingly conservative bench has moved to limit the doctrine. In 1989, the court struck down a program in Richmond, Va., that set aside 30 percent of municipal contracts for racial minorities, and that decision set off a flurry of litigation. In the current term, the court already has heard arguments in a key case: A white-owned construction company is claiming that it failed to get a federal contract in Colorado because of bonuses given to contractors that hire minority firms.

In another case making its way toward the high court, a black teacher in Piscataway, N.J., was retained while an equally qualified white teacher was fired, in the name of diversity. The Bush administration sided with the white teacher after she sued the school board. The Clinton administration backs the board. Two other cases relating to education are also moving forward. In one, white students at the University of Maryland are challenging a scholarship program reserved for minorities (story, Page 38). In the other, the University of Texas law school is being sued for an admissions policy that lowers standards for blacks and Hispanics.

While most court watchers do not expect sweeping changes in current doctrine, the high court is closely divided on racial-preference questions, and the de-

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ciding votes could be cast by Justice Sandra Day O'Connor. Legal analysts cite her opinion in a 1993 case challenging voting districts that were drawn to guarantee a black winner: "racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions." The court's most likely move: require programs to be more narrowly tailored to remedy past discrimination.

■ **Congress.** Republican victories last year mean that critics of affirmative action now control the key committees and the congressional calendar. A strategy session was held last Friday at the Heritage Foundation, a conservative think tank, bringing together about two dozen Hill staffers, lawyers and conservative activists. Already, Rep. Charles Canady, the Florida Republican who heads the key House subcommittee, has written to the Justice Department requesting every document relating to affirmative action cases. His goal: oversight hearings that try to demonstrate that the administration's civil rights policies far exceed the original intent of Congress.

Conservatives are considering amendments to appropriations bills that would restrict the administration's flexibility. There also is talk of a measure banning racial and gender preferences altogether. Civil rights proponents remain confident that Clinton would veto any measure that eviscerates affirmative action and that his veto would survive.

■ **Campaign '96.** The affirmative action issue will be test-marketed this year by Buddy Roemer, a Republican candidate for governor of Louisiana. But it is already intruding into the politics of 1996: California Gov. Pete Wilson has all but endorsed the initiative and Sen. Phil Gramm of Texas, who will soon announce his presidential candidacy, has taken over the appropriations subcommittee that handles the Justice Department. He will use it, predicts an administration official, "as a platform to rail against quotas."

The danger for Republicans lies in going too far in attacking affirmative action and courting resentful white males. If the antiaffirmative-action campaign "turns into mean-spirited racial crap, to hell with it," William Bennett warned fellow Republicans.

But the questions at the core of the affirmative action debate remain unanswered. How much discrimination still exists in America? And what remedies are still necessary to aid its victims? ■

BY STEVEN V. ROBERTS WITH JEANNYE THORNTON, TED GEST, MATTHEW COOPER, ROBIN M. BENNEFIELD, KATIA HETTER, JENNIFER SETER, SCOTT MINERBROOK IN NEW YORK AND MIKE THARP IN LOS ANGELES

FOUR TALES FROM THE TRENCHES

Banneker scholar. *Ziedah Ferguson is taking journalism classes at Maryland.*

COLLEGE PARK, MARYLAND

HOW MUCH IS ENOUGH?

A merit scholarship program for blacks is under attack in court

The lawsuit, which may go all the way to the Supreme Court, started over money. Daniel Podberesky, a white student at the University of Maryland, complained that the school offered full scholarships that were available only to high-achieving black students. He sued the university over its policy of reserving some merit scholarships by race – and won.

Podberesky's case, which the university will appeal to the U.S. Supreme Court in the next few weeks, could overturn the way American universities hand out financial aid. At issue are not only the responsibility of schools for correcting past discrimination and their desire to create a more diverse student body but also an important question about the future: At what point should affirmative action remedies be stopped because they have accomplished their purpose?

SOME 67 PERCENT OF WHITE HIGH SCHOOL GRADUATES AND 53 PERCENT OF BLACKS ENROLL IN COLLEGE.

Maryland's president, William Kirwan, says the school has a "special obligation to attract larger numbers of African-American students." Until 1954, he notes, the College Park campus was segregated; and for many years afterward it remained inhospitable to black students. The Benjamin Banneker Scholarship, the target of Podberesky's lawsuit, was created in 1979 as part of the school's efforts to answer a federal desegregation order, which remains in effect today.

By almost all accounts, the Banneker program has enriched the campus. It recruits outstanding African-American students who often become campus leaders and help bridge the gaps between black and white students. Ziedah Ferguson, like many Banneker scholars, turned down more-prestigious schools for the full scholarship at Maryland and the stature on campus that comes with it. "As Banneker scholars, we understand that our purpose is not just to be straight-A students," says Ferguson, a junior from Long Island, N.Y., who works for the school's radio and televi-

JEFFREY MACMILLAN – USN&WR

PRESERVATION PHOTOCOPY

sion station and is active in student government. "We knew we were accepting leadership roles." As a result of such involvement, white-run student groups, including the Student Government Association and the *Diamondback*, the student newspaper, have taken stands in support of the scholarship program.

Support system. Black students and faculty concede that Maryland is now more hospitable than most college campuses. A recent survey in the journal *Black Issues in Higher Education* found that among predominantly white schools, Maryland awarded the second highest number of baccalaureate degrees to black students in 1991. Twelve percent of its students are black, compared with 8 percent nationwide. Black students also run their own programs, including a lecture series and two newspapers. A $3.7 million black cultural center is now under construction.

Critics of the Banneker program cite the university's impressive record as one reason for ending the race-based merit scholarship. Podberesky's father, Samuel, an attorney for the U.S. Department of Transportation who filed the original suit, suggests that even without the Banneker money, black students would choose Maryland for its diversity and its desirable location close to Washington and Baltimore.

The senior Podberesky's main objection, however, is about fairness. He argues that schools have "a finite amount of money" and that to earmark a scholarship by race "deprives other people who may be worthy of getting the money." The Banneker scholarships go to just 139 of Maryland's 23,000 undergraduates, but the $1.2 million program made up 15 percent of this year's state-supported unrestricted aid.

Without the prestigious scholarships, top black students would likely choose other universities. Even now, up to 40 percent of those offered Bannekers turn them down each year, opting for more renowned schools, majority-black institutions or better aid packages elsewhere.

Roughly two thirds of U.S. universities earmark some scholarship money exclusively for minority students. For the most part, merit scholarships have been less controversial than other affirmative action remedies because they go only to well-qualified students who do not need help to compete in school. Maryland, like most campuses, has its share of racial tension between blacks and whites. But the presence of Banneker scholars seems to reduce hostility and promote racial understanding by chipping away at the stereotypes of white students who assume that their black counterparts are necessarily subpar students. Corey Davis, a Banneker scholar from Teaneck, N.J., says that white students come "to know us—we put a face on the issue." On today's fractious and segregated campuses, that sense of recognition may be worth cherishing.

BY JOSEPH P. SHAPIRO

JEFFREY MACMILLAN—USN&WR

s leader. *Banneker scholar Corey Davis is a columnist for the student newspaper.*

ERIK FREELAND—USN&WR

Foreman. *Renee Miles was boss on a YWCA job.*

MILWAUKEE, WISCONSIN

WOMEN IN HARD HATS

The YWCA is training a new breed of construction worker

While a political counterattack against affirmative action gathers steam across the country, in Milwaukee, Julia Taylor, the head of the local YWCA, is slowly ushering women into a traditional male bastion—the high-paying, high-skilled, building trades—more or less peacefully.

The YWCA has found that while quotas and set-asides provoke anger, plumbing contractors will hire women who serve the required four years as an apprentice. Labor unions will accept women painters if they carry their own ladders. And men don't harass a woman who is willing to climb a 35-foot telephone pole and hook up a transformer.

The YWCA has gone into the business of finding and training such women. It is teaming up with Payne & Dolan Inc., an asphalt contractor, to provide women and minority workers for highway road crews. Under a one-year, $178,600 pilot program created last month by the Wisconsin Department of Transportation, the YWCA will screen some 300 people to find about 60 women and minorities with strong work ethics, clean driving records and a willingness to endure the rigors of roadwork. Payne & Dolan and other contractors are expected to hire the workers and provide additional, on-the-job training. "Where in the past everything from the federal government has been mandated, this is a partnership,

a customer-supplier relationship," says Dawn Pratt, the director of employee development at Payne & Dolan.

The YWCA has also funded two inner-city development projects this year: the YW Villages and an Enterprise Center. Armed with $14 million in construction contracts, the YWCA has required that 50 percent of all businesses on its projects have women or minority owners and that women and minorities make up 50 percent of the work force.

Pool of talent. It has exceeded those goals, in part by providing trained workers. The YWCA's First Source program supplies a pool of 80 to 100 skilled women to building-trades contractors. "The contractors say, 'We can't find qualified people,' " says the YWCA's Taylor. "We say we have a pool of qualified people." Adds Nancy Hoffmann, the head of the YWCA's nontraditional employment training program: "We talked about how we could help them achieve our goal rather than leave it on their backs."

ERIK FREELAND—USN&WR

In the air. *Yullonda Harris (left) checks connections atop a 35-foot utility pole.*

The women work hard to learn their skills. Yullonda Harris has been climbing utility poles since August, learning to be a line mechanic. On a cloudy, chilly morning, in a limbless forest of telephone poles set up on a vacant lot, she perched atop a 35-foot pole and hoisted a 71-pound gin-arm over her head; the device holds the block and tackle used to lift a transformer into position.

IN 1970, ABOUT 4 WORKERS IN 10 WERE WOMEN. BY 2005, PROJECTIONS SAY, 6 IN 10 WILL BE FEMALE.

Meeting the 50 percent women and minorities targets for the Enterprise Center will boost costs of the $4 million project by $100,000. "It's going to cost more on this job because the contractors have to invest more in training, in recruiting and in retention," says Taylor. "We're paying for that."

Despite the YWCA's efforts, women are still only about 2 percent of the four-county Milwaukee area's 20,000-strong construction work force. And for every union such as Painters Local 781, where Business Manager Wally Kangas welcomes skilled women, there are holdouts. Operating engineers, for instance, don't think women should be driving bulldozers.

But changing demographics may require new attitudes. Already, some unions and businesses such as Outboard Marine Corp. are finding themselves looking for women and minorities to replace skilled white males who are retiring—and whose sons are going to college instead of following their fathers into a trade.

Nevertheless, the YWCA still sees a need for affirmative action requirements in government contracts. "Were it not for affirmative action, there would not have been pressure on companies to give women the opportunity to succeed or fail," says Hoffmann. She started as a plumber's apprentice in 1979 because the law required the trades to accept women; she worked to become a master plumber. "I was naive," she says. "I didn't realize women didn't become plumbers."

BY BRUCE B. AUSTER

FRAUD AND ABUSE

Trying to beat the system

When F. A. Taylor & Son won an $850,000 contract for roofing repairs at Baltimore-Washington International Airport, it met Maryland's minority participation goals by awarding an $85,000 subcontract to a black-owned firm called Roofex Inc. But when invoices from the two firms didn't seem to match up, state officials began to think something was fishy.

They were right. Investigators found that Taylor did all the work and Roofex did none, but the firms collaborated in falsifying payrolls and backdating invoices. Taylor also wrote checks to Roofex, but Roofex kicked back most of the money, keeping only a prearranged "fronting fee." Taylor owners David and Richard Taylor and Roofex President Alfred Motlow all pleaded guilty in 1991 to felony fraudulent concealment.

The headlines such tales generate often overshadow whatever benefits set-aside programs may provide. In 1993, the *Boston Herald* documented massive malfeasance in the minority-set-aside program for Boston Harbor's $3.4 billion cleanup. Denver District Attorney Bill Ritter is probing irregularities in the minority contracting program for Denver's new $4.2 billion airport (story, Page 48). And a Baltimore grand jury reported in 1992 that "widespread systematic abuse" was undermining Maryland's minority business enterprise program.

Scams. Some white-owned firms simply submit false documents to win government "certification" as a legitimate minority business. Businesses owned by women frequently turn out to have been previously owned by their husbands. The

PRESERVATION PHOTOCOPY

ST. LOUIS, MISSOURI

BLACK AND BLUE

A top cop's painful rethinking of race-based preferences

St. Louis Police Chief Clarence Harmon never dreamed he'd be fighting against the forces of affirmative action. But that was before last December, when the police department announced the results of an exam taken by officers vying to become sergeants. Though blacks made up about 30 percent of the test takers, they had only 16 percent of the top scores.

In a city that is roughly half African-American, the test results put Harmon, St. Louis's first black police chief, in an awkward political position. Things grew worse when the head of a local black police organization, Dennis McLin, presented reporters with copies of the confidential sergeants exam. The exams, McLin contended, had been mailed to him after being circulated among white officers before the test was given. "That's why we tend to [illegible]ore lower than w[illegible]," McLin said.

At the behest of the Board of Police Commissioners, Harmon launched an inquiry and found that the theft had occurred after the officers took the exam. Because the test results had not been compromised, Harmon argued, the scores should stand. That position earned him the gratitude of white officers, especially those who scored well on the exam, but the derision of some African-Americans. One letter in a black newspaper from a retired police officer called the chief "a disgrace to your race." St. Louis's black mayor, Freeman Bosley Jr. (who has feuded with Harmon over control of the department), called, without success, for an independent investigation.

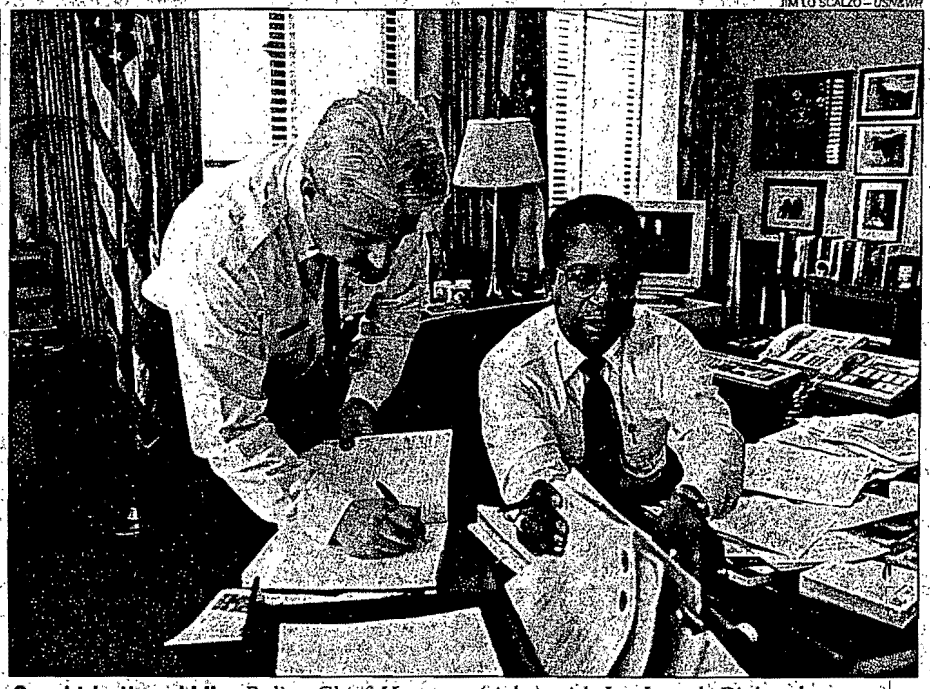
IN 1972, 10 PERCENT OF PROTECTIVE-SERVICE WORKERS WERE BLACK. IN 1993, IT WAS 17 PERCENT.

Ironically, it was Harmon who, in 1980, pushed the police department to adopt its first-ever affirmative action plan, which resulted in the hiring and promotion of hundreds of black and female police officers. Today, sitting in his corner office with a view of the Gateway Arch, Harmon muses on how he arrived at a position on race and gender preferences that is "almost 180 degrees from where I was."

His doubts first arose in the mid-1980s. Then commander of internal affairs, Harmon began noticing that in its haste to meet affirmative action goals, the department was hiring black recruits who scored relatively poorly on entrance exams. In discussions with other high-ranking black officers, Harmon worried that the new recruits would have trouble competing with their white counterparts for promotions. "It got to the point where we were wondering if this was being done by design," the chief recalls.

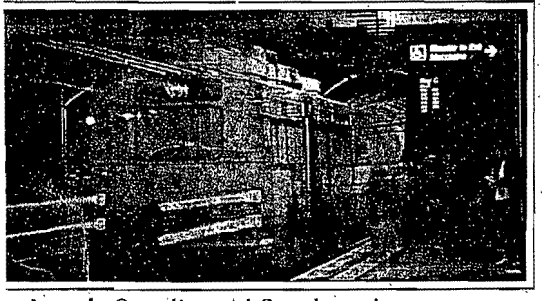
Like many blacks who joined the force in the 1960s and early 1970s, Har-

JIM LO SCALZO—USN&WR



Caught in the middle. *Police Chief Harmon (right) with Lt. Joseph Richardson*

RICH FRISHMAN FOR USN&WR



[illegible]s tunnel. *One disputed Seattle project*

[illegible]stice Department has charged con[illegible]uction giant Peter Kiewit Sons Inc. [illegible]th using one minority and one woman-[illegible]ned firm as captive fronts to win contracts on three Seattle-area projects. The firm's attorney says the charges are groundless. The case is in discovery.

Oversight of affirmative action programs is often lacking. A recent audit revealed that 46 out of 65 firms certified as minority- or women-owned by the Denver mayor's Office of Contract Compliance did not meet the city's criteria. The audit said [illegible] estimated $34 million in city contracts was awarded to the ineligible firms over a three-year period. Prosecutions or even hefty fines are relatively rare, and "that lack of enforcement allows and even fosters abuse," says Ted Webster, a prominent minority contractor in Boston, where enforcement has been stepped up since the embarrassing press reports.

Some observers claim there are not always enough capable minority firms to meet a project's goals, so general contractors fearful of losing the business use front companies to reach the targets. Minority contractors usually don't buy that excuse but admit that their cohorts' collusion in such schemes only adds to the problem. The result can be a system that does more harm than good.

BY GORDON WITKIN

PRESERVATION PHOTOCOPY

THE WASHINGTON POST
FRIDAY, FEBRUARY 24, 1995

Control Board For D.C. Starts To Take Shape

Congressional Group Drafts Fiscal Takeover

By David A. Vise
and Howard Schneider
Washington Post Staff Writers

A bipartisan group in Congress hopes to reach agreement by next week on the details of a new financial management and control board that would direct the District's spending and budgeting for at least three years, local representatives said yesterday.

The members of Congress, led by Reps. Thomas M. Davis III (R-Va.) and James T. Walsh (R-N.Y.) and Del. Eleanor Holmes Norton (D-D.C.), are nearing agreement on a broad outline of how the financial control board would work. Their staffs are to hold discussions leading to a "memorandum of understanding" about the control board and then to legislation that would be introduced in March.

"We are trying to work a consensus piece here," Davis said. "This is not a partisan, hardball style. This is something we need to move quickly on and work with unanimity on. Mrs. Norton will be a key player. The city will be brought into the conversation at an appropriate time."

One of the most important issues is how much power the board would have to cut the District's work force and spending. Although there is agreement that the board will have considerable authority, the question of how much clout will remain with D.C. Mayor Marion Barry (D) and

See DISTRICT, A12, Col. 4

Bipartisan Group in Congress Prepares Fiscal Rescue of D.C.

DISTRICT, From A1

the D.C. Council has not been answered.

Davis said the issue will be influenced by the mayor and D.C. Council in the days ahead. If local officials cut spending aggressively and implement layoffs, they will retain more power; if they do not, they will have less.

"If they put their head in the sand and say, 'We are not cutting anybody else,' the control board may be stronger," Davis said.

Yesterday, the D.C. Council held a day-long hearing on ways to boost revenue by imposing new taxes on nonprofit organizations and on the Federal National Mortgage Association, or Fannie Mae, the highly profitable, District-based mortgage company, which pays no local income taxes. Several members of Congress have said that D.C. taxes already are too high and that the city must address its immediate financial problems by cutting spending rather than by raising taxes.

Davis said that he favors a control board made up of financial experts and that neither the mayor nor any other elected official would serve as a member. Other sources said the board would have from three to seven members. "You want an odd number, and you want it small," Norton said.

A majority of the board members would be appointed by Congress and it is possible that Congress would pick all the members, sources said. Davis said no agreement had been reached on who would serve on the control board.

"We have given no serious thought as to who it might be," Davis said. "We are not there yet. Let us figure out the structure and then find the people to fit the structure."

Norton said she is committed to ensuring that the control board does not take home rule away from the District. The challenge will be structuring a board with sufficient power, independence and credibility to carry out its mission while preserving a meaningful level of self-government, she said.

Norton said she will meet early next week with Barry and D.C. Council Chairman David A. Clarke (D) to discuss the details of the control board. Michael F. Rogers, D.C. city administrator, said local officials want to be part of the process.

"We ought to participate in the discussion and have a say, and I hope we will," Rogers said.

Congressional sources said there was little sentiment to give local elected officials much say over the nature of the board after Wednesday's congressional hearing and the findings of a recent General Accounting Office report. The report said the District is "insolvent" and has failed to comply with congressional orders to cut spending and employees.

Norton said the hearing succeeded in getting Congress moving toward a federal plan to rescue the District from a financial crisis. "The best thing to come out of the hearing is an understanding that the pace needs to be quickened," she said. "We can't let the District bleed to death."

Davis said the control board would have its own full-time professional staff of financial experts. If models adopted in other cities are followed, the members of the control board would not be paid and would serve part time after an initial intensive phase. If Congress decided to give the board more day-to-day authority to make decisions about city spending, the board could be a full-time assignment, sources said.

Congressional sources said the control board would not require the city to balance its budget this year. Instead, it would seek to

> *"We can't let the District bleed to death."*
>
> —Del. Eleanor Holmes Norton

bring spending and revenue into balance over a few years as cuts in spending are implemented.

In addition to having the power to review the District's spending and budget plans, the control board also would play a central role in helping the city come up with the hundreds of millions of dollars it needs to make it through the coming year.

The legislation creating the control board might include a provision enabling the board or some other new entity to borrow from the U.S. Treasury on the city's behalf. Under another scenario being discussed, a new entity would be created to borrow money for the city on Wall Street.

At yesterday's D.C. Council hearing, Clarke said he was "sorely disappointed" that Fannie Mae officials had chosen to lobby council members individually rather than send a representative to answer questions publicly about legislation urging Congress to let D.C. tax the company's income. Fannie Mae saves hundreds of millions of dollars each year in local taxes through a congressionally granted tax break, and company officials said any new tax burden would drive up the cost of buying a house.

"The fact they didn't show up should be taken as an insult by every resident of the District," said William Cunningham, a D.C. resident who testified in support of the tax. "I'm willing to bet their lobbyists are here. It is not fair."

Fannie Mae spokesman David Jeffers said the company submitted its views in writing "even though many members of the council appear to have made up their mind [to support] the resolution."

PRESERVATION PHOTOCOPY

PRESERVATION PHOTOCOPY

THE WASHINGTON POST
FRIDAY, FEBRUARY 24, 1995

Clinton Orders Affirmative Action Review

At Stake: Principles And Political Base

By Ann Devroy
Washington Post Staff Writer

A1

President Clinton has ordered an "intense, urgent review" of all aspects of the government's affirmative action programs, aimed at protecting those that can be shown to work and jettisoning or altering the rest.

In a closed-door meeting Wednesday with House Democrats, the president warned of what many Democrats already fear: that the GOP will try to use the issue of racial preferences to slice into the multiracial coalition that traditionally has supported Democrats. White males in the last election generally favored the GOP, and Republicans want to keep them with arguments that the GOP is "colorblind" while Democrats give minorities unfair advantages.

An attendee at the Wednesday House session quoted Clinton as saying, "We have to outsmart the Republicans. We have to help those who deserve help and stand behind the best aspects and principles of opportunity. But we should also be prepared to recommend modifications where there are problems. We cannot walk away from this fight."

Clinton over the past week has granted a series of interviews with black reporters in which he has made a broad case for continuing government programs that give preference to minorities in cases

See CLINTON, A14, Col 1

Clinton Prepared to Defend Affirmative Action, Jettison Some Programs

CLINTON, From A1

where discrimination has been proven and the action redresses the effects of that discrimination.

George Stephanopoulos, senior Clinton adviser, directs the group overseeing the White House review of government affirmative action programs and upcoming court cases on the issue. Democrats in the White House and elsewhere are also concerned about the implications of a proposed ballot question in California that would amend the state constitution to prohibit public agencies from granting preferential treatment based on race, sex, color, ethnicity or national origin.

White House officials fear that inclusion of the issue on the 1996 ballot will bring affirmative action into the forefront of California electoral politics. Two Republican presidential candidates, Senate Majority Leader Robert J. Dole (Kan.) and Sen. Phil Gramm (Tex.) already have made an issue of affirmative action.

Prominent Republicans have been vocal in their attacks on affirmative action although it is unclear how far they would go legislatively. Gramm has said if he is elected president he will end major set-aside programs on his first day in office. Dole has broadly questioned affirmative action programs and said in a recent television appearance that more than 60 percent of white males voted Republican in the last election "because of things like this, where sometimes the best qualified person does not get the job because he or she may be one color. And I'm beginning to believe that may not be the way it should be in America."

And one of the party's more prominent conservative theoreticians, William Kristol, this week used his fax machine to send out his latest memo to Republicans asserting that a "major element" of the GOP effort once past the "Contract With America" provisions should be "a rollback of the massive system of racial preferences and set-asides that has come to infect federal law and American life over the past 25 years."

The president's immediate problem is how to respond to attacks on specific programs, such as this week's effort by House Republicans to pay for a health care tax deduction by repealing a tax break firms get for selling broadcast licenses to minorities. The White House is preparing for Republicans to find preferences that are difficult to defend, like some of the broadcast license awards, to try to box the president into continually defending racial preferences.

One senior administration official said of the White House "intense, urgent" review, which includes coordination with several departments and agencies, "Republicans come at this as 'Democrats support race-based quotas and set-asides and will give your job or your contract or some other break to someone just because they are black.'

"We are now beginning serious conversations about the whole realm of issues involved here, given the president's fundamental commitments. We cannot turn away from affirmative action. The issue to us is, is there an approach to protect these programs, or most of these programs, in which we can also win the political argument?"

Vice President Gore has held a series of three private dinners, the final one Tuesday, involving a broad range of civil rights leaders, writers, educators, elected officials and others for discussions of race. The dinners are meant to spur an exchange of ideas on race and politics as issues such as affirmative action move into the forefront.

A senior administration official said Clinton won't back away from the "principle" of affirmative action. "Our base would go nuts" if the White House backed away in any significant way from affirmative action, the official said, "so it will take a lot of serious work and sophisticated effort to protect these programs in the current political climate."

Stephanopoulos said Clinton "has a history on these issues and feels very strongly" about the goal of using affirmative action to redress past discrimination and bring more nonwhites and women into the middle class. He said the president, in discussing the issue with congressional Democrats Wednesday, encouraged their leadership to collaborate in a review of the government programs.

Clinton has begun making the case that Republicans are trying to fuel anxiety among white middle-class voters.

In an interview with the American Urban Radio Network last week, he said, "I think this is a Congress that is highly political on some issues and wants to turn them into wedges. . . . I realize at a time of high anxiety for majority voters, the temptation is almost irresistible by some to look for racial wedge issues."

His goal, Clinton said, is a full national debate about specific programs, their records and alternatives in a discussion "that will bring the American people together, not the onset of another political campaign designed to divide us."

In a separate radio interview last week, on the Tom Joyner Show, Clinton said, "I am hoping that instead of this being a bad thing that divides us, we can turn this thing on its head and take it away from the people who want to use it for pure politics. . . ."

Clinton said his administration would "look at all the things that people call affirmative action" and "where there's evidence of discrimination, I think that affirmative remedies should lie." He added, "I think most people would admit that whenever there is evidence of discrimination in a particular case or group of cases, an affirmative remedy is an appropriate thing. The real question is, how far beyond that should you go?"

Officials point to polls that show that as overt, public racism has become unacceptable to most Americans, the belief has grown that discrimination, therefore, has significantly diminished. That makes a majority of Americans believe that granting special preferences for jobs or government contracts or school admissions or scholarships based on race are no longer needed and are unfair.

It has produced declining support for continuing three decades of affirmative action and a sympathetic reception to Republican assertions that the government and courts should be "colorblind."

Those in the government committed to affirmative action and involved in monitoring it acknowledge that the abuse of some programs gives ammunition to critics. Deval Patrick, assistant attorney general for civil rights at the Justice Department, said in a recent Washington Post interview that "there is good affirmative action and I think there is bad affirmative action. I think we all have to face up to the fact that in some cases affirmative action is abused and I am not persuaded that the abuses you sometimes hear . . . are the rule rather than the exceptions."

Republicans clearly see a political advantage in taking on the fight. Republican National Committee Chairman Haley Barbour said, "I think if President Clinton defends quotas, speaks in favor of special preferences and supports reverse discrimination, I think that will divide him from the vast majority of American people."

From the other side of the political spectrum, the pressure is as intense. Jesse L. Jackson, one of those who attended the Gore dinners, said that instead of reviewing programs and "looking for ways to avoid the issue," Democrats should be "standing up and defending" one of the nation's "great success stories rather than having it turned into a wedge." If there are abuses, Jackson said the administration should "find the [illegible] not allow the programs to be [illegible] tailed.

THE WALL STREET JOURNAL

DATE: 5-28-96

PAGE: A14

Endgame for Affirmative Action

By TERRY EASTLAND

Last week's federal appeals court ruling against preferences in admissions used by the University of Texas law school has reignited the debate over affirmative action. By Election Day, the issue promises to heat up even more.

In Congress, a House subcommittee recently approved legislation co-sponsored by Sen. Robert Dole (R., Kan.) and Rep. Charles Canady (R., Fla.) that would outlaw preferences in employment, contracting and all other federal programs. The full House could vote on the bill this summer. Meanwhile, last month in California, an initiative that would prohibit state and local governments from engaging in preferential treatment gained enough signatures to qualify for the November ballot.

Both the California Civil Rights Initiative (CCRI) and the Dole-Canady bill would permit nondiscriminatory affirmative action, such as that used in recruitment and training. The focus of the two measures is preferential affirmative action in which considerations of race and sex determine who gets a job, a contract, or another opportunity regulated by government.

Popular Measures

Surveys in California show that large majorities favor CCRI. These results are consistent with ones produced by national polls taken over the past two decades. If the initiative process (used in 23 states) were available at the federal level, and Dole-Canady were offered to the people for their approval, the measure would, like CCRI, be an odds-on favorite. But governed as it is by the Constitution and congressional rules, Dole-Canady could be stopped by a Senate filibuster or a presidential veto. It could also be signed into law—by President Dole.

The Clinton Justice Department already has promised to recommend a veto. "Race can be taken into account as a preference," says Associate Attorney General John Schmitt. Unless President Clinton effects his most agile triangulation yet, it's hard to see how he could fail to oppose CCRI, which Sen. Dole supports.

The stage thus is set for a major debate in this election year over the wisdom of maintaining preferential policies. That this issue is now so squarely before the nation, even literally before the voters of our most populous state, is not surprising. There are reasons preferences have never enjoyed majority support and are now in serious political trouble:

• *Preferences are discriminatory.* Whatever might be said in support of preferences, they necessarily discriminate against those who lack the "right" race or sex. There is no getting around this fact, demonstrated anew by the Texas law school admissions case, in which the lead plaintiff Cheryl Hopwood, who is white, had academic credentials superior to most of the black and Mexican-American students admitted under an affirmative action plan. Three decades of preferences have drilled home this essential point, perhaps best expressed by Colin Powell in his autobiography: "Discrimination 'for' one group means, inevitably, discrimination 'against' another."

• *The discrimination caused by preferences is real.* Indeed, it is the sting of this discrimination—jobs and contracts are lost, seats in universities denied—that has led individuals of the "wrong" race or sex to file lawsuits challenging preferences. In last year's big affirmative action case, Randy Pech, owner of Adarand Constructors, which builds highway guardrails, was the low bidder on a federally funded highway project. The job instead went to a Hispanic-owned company. Adarand, owned by a white man, is one of five Colorado companies that build guardrails; because the other four are owned by Hispanics or women, they have enjoyed an advantage in bidding for contracts governed by state or federal affirmative action policies. Mr. Pech has wound up being the exclusive target of set-aside laws: "If I weren't here," he says, "they'd have no impact." It was the discrimination he experienced over the years in bidding for certain contracts that finally drove him to mount his court challenge.

• *Preferences don't counter discrimination.* Because preferences are often a response to presumed discrimination on the part of a company, a government, or society generally, they move the focus away from the real instances of discrimination that should be at the heart of law enforcement efforts. If we shifted to policing actual discrimination the resources now used for enforcing preferences, perhaps toughening the sanctions, we could more effectively combat real bias.

Relatedly, it's now abundantly clear that preferences don't help the "truly disadvantaged," as the University of Chicago sociologist William Julius Wilson was among the first to point out. Instead, they mainly help, in Mr. Wilson's words, "minority individuals from the most advantaged families." Once preferences are put aside, we will be able to focus on devising policies that would most enhance equal opportunity for "the least advantaged." Among them: tax breaks for start-up companies in the inner city, stiffer academic standards for students and competency tests for teachers.

• *Preferences have proved to be a bargain with the devil.* "Over a period of some 125 years," writes Andrew Kull of the Emory Law School, "the American civil rights movement first elaborated, then held as its unvarying political objective, a rule of law requiring the color-blind treatment of individuals." During this period, he says, "the right of the individual to be treated without regard to race was strenuously defended as a moral and political end in itself." The 1964 Civil Rights Act marked the greatest triumph of the color-blind principle, but that principle had to be suspended so that individuals could be treated with regard to race.

Today it is apparent how weak-minded and dangerously naive it was to think that taking race into account could produce unambiguously good effects for those in whose behalf it was done. Preferences have made it harder to overcome the tendency (so rightly deplored by the civil rights leaders of old) of judging people in terms of their racial and ethnic groups. As Justice Clarence Thomas wrote in the *Adarand* case, preferential affirmative action "teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. . . . These programs stamp minorities with a badge of inferiority."

Not surprisingly, some minorities have concluded that the best way to escape the public implications of affirmative action is to say "no" when they know it is being offered. The bargain with the devil that is affirmative action helps explain why substantial numbers (sometimes large majorities) of those typically eligible for preferential treatment—African-Americans, Hispanics and Asian-Americans—tell pollsters they are opposed to preferences.

• *Preferences don't make sense, given*

CONT'D

The Washington Post

DATE: 3-28-96

PAGE: A-27

George F. Will

Subverting Diversity

The ruling of the U.S. Court of Appeals for the 5th Circuit concerning affirmative action in the admissions process at the University of Texas Law School may or may not be momentous. Unless and until it is appealed to and affirmed by the Supreme Court, it applies only to Texas, Louisiana and Mississippi. But if it is affirmed, its significance will transcend constitutional law.

The dynamite in the circuit court's ruling is the assertion that racial preferences can never be justified as a means of achieving "diversity." This means affirmative action policies, which often are referred to as "race-based remedies," must be just that—remedial, narrowly tailored to correct specific discrimination by the particular institution, not by society generally.

The diversity rationale for affirmative action has served the double purpose of broadening the racial spoils system by severing it from mere remediation, and making it permanent by putting it in the service of an endless project. But the deeper significance of the cult of "cultural" diversity in higher education is that it denotes an aggressive ideology concerning the meaning of culture, the aims of education and the merits of the United States.

It is serendipitous that the circuit court's ruling coincides with the publication, in the Public Interest quarterly, of Clifford Orwin's essay "All Quiet on the (post)Western Front?" Orwin, an American political scientist at the University of Toronto, unpacks from "diversity" the full agenda of multiculturalism.

Before the ascendancy in academic circles of what Orwin calls the relativistic understanding of culture, the idea of culture was connected to the idea of intellectual cultivation, which is a difficult attainment, not a democratic entitlement. But, says Orwin, cultural relativism asserts that every "people" (nowadays this means every racial, ethnic or other group organized around a grievance) has a culture, understood as the totality of its social practices, and all cultures are equal in the sense that there are no neutral principles—no principles that are not themselves mere emanations of a culture—for evaluating them.

Multiculturalism is a fact: Americans have various racial and ethnic backgrounds and experiences. But multiculturalism as a policy is not, Orwin argues, primarily a response to that fact. Rather, it is an ideology, the core tenet of which is this: Because all standards for judging cultures are themselves culture-bound, it is wrong to "privilege" Western culture, and right to tailor university admissions and curricula to rectify the failure to extend proper "recognition" and "validation" to other cultures.

Orwin says this "inclination to treat students ascriptively rather than as individuals" translates into the right of ever-more recondite "cultures" (for example, "gays and lesbians of color") to "construct a playground of their own at university expense"—a course of their own, a department, a dormitory. Because supposedly "marginalized" cultures are defined in opposition to the oppressive dominant culture, Orwin says multiculturalism has less to do with the serious study of other cultures than with promoting a particular interpretation of American culture.

As a result, "multiculturalism is not ecumenical but adversarial." And "one will rarely encounter a more efficient engine of intellectual sameness than this ideology which celebrates difference."

Multiculturalism does not mean the replacement of the familiar by the strange. Rather, says Orwin, it means the replacement of the strange by the familiar as popular culture gains in panache as a subject of supposedly serious study. This is because popular culture—for example, movies and other entertainments—is understood either as a conspiracy by which the masses are controlled or the means by which the masses express resistance to control.

In contrast, old books have two defects: They are old and they are books. Being old, they are mere representations of power relations (all works of the mind are merely such representations) in irrelevant social orders. And because there are no permanent standards, it is fallacious to think that old things can be what Orwin calls "permanent beacons for thoughtful human beings." Being books, they require reading and what Orwin calls "the habits of rumination appropriate to them." This explains "the aversion of today's students to reading."

All this may seem distant from the question of the unconstitutionality of different law school admissions standards for different races. But behind the seemingly bland and benign celebration of "diversity" there simmers an ideology of disparagement regarding this nation, and an agenda of what the circuit court calls "racial social engineering." The full resonance of the court's ruling could make the ruling an event as important as the presidential election.

AP Associated Press

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Administration Strongly Opposes GOP Affirmative Action Bill
By JIM ABRAMS
Associated Press Writer

WASHINGTON (AP) - The Clinton administration urged Congress Tuesday to reject legislation sponsored by Senate Majority Leader Bob Dole that would restrict federal affirmative action programs, saying it was "blunt and extreme."

Republican backers of the bill said in Senate hearings that it would make all federal hiring and contracting colorblind, while Democrats said it was an attempt to introduce a race issue during an election year.

The bill, introduced by Dole and in the House by Rep. Charles Canady, R-Fla., would end the use of race and gender preferences by the federal government in employment, contracting and running programs.

It would allow affirmative action such as trying to increase minority or female applicants for jobs or contracts, as long as the final selection decision is nondiscriminatory.

The proposed Equal Opportunity Act, Canady told the Senate Labor and Human Resources Committee, recognizes that a system of preferences "denies opportunities to those who have been guilty of no wrongdoing, simply because of their race or gender, while granting benefits to individuals who are not victims of discriminatory conduct."

But Deval Patrick, assistant attorney general for civil rights, said it was "such a blunt and extreme measure that it would work substantial harm."

Patrick, who is black, cited his own example of being refused taxi rides after emerging from meetings at the White House. He said the bill was "a rejection of the compelling need to remedy the effects of past and present discrimination."

If the bill passes Congress, he said, the Justice Department will urge President Clinton to veto it.

The administration argues that affirmative action programs are already constrained by a Supreme Court decision last year that said they must be narrowly tailored to serve a compelling interest. Further, officials say that under Clinton's "mend it, don't end it" policy, steps have already been taken to end programs that create quotas and set-asides or give preference to unqualified individuals.

That's still not good enough, argued Rep. Tom Campbell, R-Calif., saying it was "morally wrong for the government to discriminate between its citizens on the basis of their race. Everything else is secondary."

At a simultaneous hearing on an anti-affirmative action initiative in California, Sen. Orrin Hatch, R-Utah, chairman of the Senate Judiciary Committee, said: "Governor (Pete) Wilson is trying to lead California down the right path. President Clinton is leading America down the wrong path."

Wilson, whose state has already ended affirmative action in university admissions, said Californians will vote in November to end "policies and practices that began with the best of intentions but that today breed resentment."

Cont'd

Los Angeles Times

DATE: 5-1-96

PAGE: A-1

Senate Spotlights Affirmative Action Debate

By DAVE LESHER
TIMES STAFF WRITER

WASHINGTON—Senate Republicans turned an eye toward California on Tuesday, staging a hearing that portrayed the state's anti-affirmative action ballot measure as the harbinger of a national debate and a looming confrontation between the prospective White House campaigns.

Witnesses on both sides, including California Gov. Pete Wilson, warned that the issue is packed with "social dynamite" and grave consequences for race relations if America chooses the wrong path.

But the day also left little doubt that California's debate over its ballot measure will be highly charged with national interests and presidential politics. Sen. Orrin G. Hatch (R-Utah), chairman of the Judiciary Committee, opened the hearing Tuesday morning by staking out the sides in the upcoming showdown.

"Nothing better sets out the starkly different visions of this administration and those of us who believe in equal opportunity for all Americans than the Clinton administration's attempted bullying of California on this matter," said Hatch. "Nothing better belies this administration's claim to be reformist. . . . It is essentially a defender of the status quo."

Simultaneous with the Hatch hearing, another Senate committee Tuesday considered a federal version of California's ballot measure that was proposed by Senate Majority Leader Bob Dole, the presumptive Republican presidential nominee.

At that hearing, a Clinton administration official dismissed Dole's bill as a "blunt and extreme measure" that would "work substantial harm."

Both measures—one aimed at the state government and one aimed at the federal level—would ban special considerations for women and ethnic groups in government hiring and contracting.

Together, the two Senate hearings underscore Republican expectations that most Americans agree with them and support the California ballot measure. Dole has endorsed the initiative and he plans to campaign for its passage in the state, where polls show he is far behind President Clinton.

But Democrats said Tuesday they expect the Republican plan to backfire. And they dismissed the Judiciary Committee hearing as "a totally political" event, said Ann Lewis, spokeswoman for the Democratic campaign.

At the White House, officials also blasted Dole for being hypocritical on the issue because he favored affirmative action programs in the past.

"Senator Dole is looking for a campaign issue," said George Stephanopolous, Clinton's senior advisor. "For years, he has supported affirmative action. Now that it is an election year, he's spearheading an effort to completely eliminate equal opportunity programs even beyond what the Supreme Court is calling for. That is an extreme position."

Dole spokeswoman Joyce Campbell acknowledged the senator's past support for programs that included preferences based on race and gender. But she said that "record does not disqualify him today from raising legitimate questions about the continuing fairness and effectiveness of affirmative action."

Polls in California indicate that a majority of voters support the state's ballot measure to ban affirmative action programs. But Clinton officials said they believe public attitudes will moderate when voters are educated during the upcoming campaign.

The Supreme Court case Stephanopolous referred to was last year's Adarand decision in which the justices found "all racial classifications" by government agencies are "inherently suspect and presumptively invalid." The court said racial classifications could only be constitutional if they serve a compelling government interest and are narrowly tailored to further that interest.

Following the court's decision in June, Clinton ordered the Justice Department to review federal agencies for compliance. The review was the basis for the president's subsequent announcement of an affirmative action policy he dubbed, "Mend it, don't end it."

At Tuesday's Senate hearing, opponents of the California initiative praised Clinton's approach. But the discussion also underscored the legal confusion, semantic ballet and tearful emotions that this issue generates.

Both sides agreed on two things: that racial and gender discrimination still exists in America and that the nation's goal is to end it. But each side blamed the other for perpetuating the problem rather than finding a solution.

Supporters of the ban on affirmative action programs, including Wilson, said the current system is unfair because it promotes some ethnic groups over others in an attempt to obtain diversity. Despite court rulings that prevent quota systems based on race, Wilson argued that a special consideration granted to ethnic groups cannot be accomplished any other way.

" 'Preference' is the euphemism we use to describe discrimination by which a quota is achieved," Wilson testified to the committee. "It is the process that guarantees selection of a member of a favored group. Selection in this system is based not on merit. . . . It is based on membership in a preferred group defined by race, ethnicity or gender."

Wilson was joined at the hearing by Ward Connerly, chairman of the California ballot measure and the University of California regent who spearheaded last summer's decision by the university to drop race as a factor in hiring or admissions. Like other speakers, Connerly cast the discussion about individual rights versus group rights as a historic hallmark.

"We are confronted with a clear clash of values," he said. "There is nothing that will define this nation more than how we resolve this issue."

Connerly has become an increasingly controversial figure as he gains national attention as an African American who believes minorities are handicapped by special treatment. Tuesday, he punctuated the hearing with a sharp exchange aimed at Sen. Carol Mosley Braun (D-Ill.), the Senate's only African American member and a supporter of affirmative action.

"There are all kinds of preferences" in government, she said, but they "only get to be an issue when it comes to race."

Connerly charged that civil rights groups opposed to the ballot measure are "trying to protect political power. It's a game of racial self-interest which has nothing to do with rights."

Sen. Paul Simon (D-Ill) warned darkly about the measure's consequences. He suggested that America should consider what happened during the racial strife demonstrated in Bosnia, Rwanda and Burundi.

"When men in white hoods do the wrong thing, however sincere they may be and no matter how popular their cause may be in certain circles, responsible Americans should stand up," Simon said. "And the United States Senate should be sensitive on the issue of racism, not to pander to those who would divide our society. . . . Let no senator and no American fool himself or herself—we are dealing with social dynamite."

Opponents of the California initiative also testified about their concern that the language of the measure could inadvertently threaten existing protections against gender discrimination. The issue was hotly contested, with legal interpretations offered from both sides.

California Democratic Sen. Dianne Feinstein said for the first time that she will oppose the state's ballot measure, citing concerns that it might adversely affect women.

"The benign language of this initiative, which makes it so attractive, I must say is what makes it so misleading," she said.

eeoc U.S. Equal Employment Opportunity Commission

NEWS

FOR INFORMATION CONTACT:
William D. Snapp
Regional Attorney, EEOC
Atlanta District Office
(404) 331-6092

or

Rhonda L. Klein
Senior Trial Attorney
(404) 331-2707

ATLANTA DISTRICT OFFICE OF THE EEOC SETTLES A RACIAL HARASSMENT AND RACE DISCRIMINATION CASE AGAINST Q LUBE, INC.

Atlanta, Georgia - The Atlanta District Office of the Equal Employment Opportunity Commission and Q Lube, Inc., f/k/a Quaker State Minit Lube, Inc., reached a settlement concerning a lawsuit complaining of racial harassment and race discrimination. The lawsuit arose out of a charge of discrimination filed with the EEOC by Larry Gantt complaining that Q Lube created and maintained a racially hostile work environment and failed to provide him with training necessary for promotion because of his race in violation of the Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e) et seq. After investigating Mr. Gantt's charge, the EEOC filed suit in the United States District Court for the Northern District of Georgia, seeking injunctive relief prohibiting Q Lube from engaging in employment practices which discriminate on the basis of race and seeking monetary relief on behalf of Mr. Gantt, including appropriate backpay, compensatory and punitive damages. Although Q Lube agreed to pay Mr. Gantt an undisclosed sum of money to settle the dispute, Q Lube denies that it

THE WALL STREET JOURNAL WEDNESDAY, SEPTEMBER 6, 1995

Clinton, in Pete Wilson's Backyard, Takes Tough Affirmative-Action Stance

By MICHAEL K. FRISBY
Staff Reporter of THE WALL STREET JOURNAL

SELMA, Calif.—Stumping in Gov. Pete Wilson's backyard, President Clinton grew tougher on affirmative action, even taking credit for killing a program his administration tried to preserve.

Gov. Wilson, in his quest for the GOP presidential nomination, has scored points for seeking to end affirmative action and stop illegal immigration. On his visit to the state, Mr. Clinton apparently saw the need to embellish his own credentials in these controversial areas that Californians care about.

Mr. Clinton brought up affirmative action in a speech Monday, saying "there are problems" with the federal government's programs. "I've already abolished one that I thought was excessive," the president said. "And I was glad to do it."

Aides said Mr. Clinton was referring to the Federal Communications Commission program that gave capital-gains tax deferments to media companies that sold outlets to minorities. But his references didn't accurately portray either his or his administration's role in killing the program. It was the type of slip that often occurs in the heat of an election campaign, but for Mr. Clinton it recalls past statements that seem to shade the truth and appease people on both sides of an issue.

Earlier this year, there was an outcry from affirmative-action critics when a partnership including Frank Washington, an African-American businessman, sought to buy Viacom Inc's cable holdings for $2.3 billion; the FCC affirmative-action program would have saved Viacom as much as $640 million in taxes.

Congressional Republicans moved to kill the program and to do it retroactively to single out the Viacom deal.

The FCC and Treasury Department testified at Finance Committee hearings in favor of reforming rather than repealing the program. But when Republicans wouldn't compromise, Mr. Clinton signed legislation abolishing the program when it was included in a bill providing a 25% tax deduction to self-employed individuals who purchase health insurance.

In the past, even during his major speech on affirmative action in July, Mr. Clinton hadn't tried to claim credit for killing the program. Yesterday, Michael McCurry, the White House press secretary, acknowledged that Mr. Clinton didn't favor abolishing the program altogether, but said, "We felt all along there was a problem and it needed to be reformed." When asked why Mr. Clinton portrayed himself as enthusiastically killing it, Mr. McCurry, said, "It would be impossible for the president to summarize the lengthy congressional debate in a speech that required a shorthand formulation."

The president did restate his support for the goals of affirmative action. But much of his speech here had a different tone than the July speech in which he strongly supported affirmative action, but said that some changes would be required. On Monday, however, he said, "I'm against quotas. I'm against reverse discrimination. I'm against giving anybody unqualified anything they're not qualified for. But I am for making a conscious effort to bring the American people together."

In the same speech, Mr. Clinton offered up tough talk on immigration, saying, "We have too many illegal immigrants in the country. We've done what we could to close the borders and to send people back."

But Mr. Clinton courted the other side, too. He reminded the crowd that "this is a nation of immigrants," and more importantly, he said social issues, such as immigration, affirmative action and welfare, are not what is hurting the middle class today. He seemed to be unveiling a blueprint for dealing with these difficult social issues that the Republicans may use in a bid to divide working-class voters. Mr. Clinton's strategy: point the finger at stagnant wages, a topic his aides hope will take some steam from other issues.

1/2

Leading the News

Affirmative Action

Piscataway School Board Seeks Supreme Court Review Of Its Affirmative Action Policy

A New Jersey school board seeks Supreme Court review of an affirmative action case that has attracted national attention to the permissible role of race as a factor in employment decisions (*Board of Education of the Township of Piscataway v. Taxman*, US SupCt, No. 96-679, petition for writ of certiorari filed 10/31/96).

"This case has become a lightening rod in a stormy national debate over whether Title VII [of the Civil Rights Act of 1964] permits school officials to consider race in employment decisions to foster a diverse learning environment," the Board of Education of the Township of Piscataway wrote in its Oct. 31 petition for a writ of certiorari.

At its core, *Board of Education of the Township of Piscataway v. Taxman* raises the question of whether an affirmative action plan set up solely to promote diversity violates Title VII's prohibition on race discrimination.

The high profile case involving the layoff of a white teacher instead of a black teacher with equal seniority and qualifications was cited by Republican presidential challenger Bob Dole in his second nationally televised debate with President Clinton in San Diego on Oct. 16 as an example of what is wrong with the Clinton administration's pro-affirmative action stance (202 DLR A-1, 10/18/96).

The employment action at issue in the case is a 1989 decision by the Piscataway school board to lay off high school teacher Sharon Taxman rather than Debra Williams, who is black, to promote diversity pursuant to a voluntarily adopted affirmative action plan.

Racial Considerations: Management's Prerogative

The school board had no history of discrimination against blacks, and blacks were not underrepresented on the professional staff at the school, but within the secretarial studies department where one teacher had to be laid off, Williams was the only minority faculty member. In its petition, the board argued that race was a permissible factor to consider given the fact that the student body at the school is racially diverse.

The school board argued in its petition that the Supreme Court should accept the case for review and rule that promoting racial diversity in a high school faculty is permissible under Title VII.

On Aug. 8, the U.S. Court of Appeals for the Third Circuit in an 8-4 vote struck down the school board's affirmative action plan, saying it violates Title VII (155 DLR AA-1, E-1, 8/12/96).

The board called the decision "disturbing," arguing that the Third Circuit's interpretation of Title VII impinges on the prerogative of management to take race into consideration even when employment considerations such as a diverse student body and the "educational benefits of a racially diverse teaching staff" weigh in favor of using race as a factor in employment decisions.

Legality Of Promoting Racial Diversity

The school board argued in its petition that the Supreme Court should clarify whether Congress intended Title VII to authorize affirmative action plans that seek solely to promote racial diversity, or if lawmakers meant for the sweeping 1964 civil rights law to justify only affirmative action plans that are set up to remedy past racial wrongs.

"One need look no further than the procedural history of the present case" to see how confusing the question is, the board argued, referring to the fact that under the Bush administration, the Justice Department supported Taxman, and under Clinton, the same department, relying on the same case law, supports the board.

"Clarity is all the more important to our Nation's school board which must make sensitive personnel decisions in the best interests of an increasingly diverse clientele, without violating" Title VII or a plethora of other federal employment laws, the board argued.

According to the board, the Third Circuit misconstrued two Supreme Court decisions dealing with affirmative action as holding that unless an affirmative action plan is remedial, it is not permitted under Title VII. The two cases are *United Steelworkers v. Weber*, (443 U.S. 193 (1979)) and *Johnson v. Transportation Agency, Santa Clara County*, (480 U.S. 616 (1987)).

Circuits Split, Board Says

In both decisions, the Supreme Court approved affirmative action plans, but "never intended to limit" such plans to those that are remedial, the school board maintained. The Third Circuit decision "cannot be squared with the [Supreme] Court's statements in *Weber* and *Johnson*," the board said.

The board also argued that the Third Circuit's decision is at odds with rulings from the U.S. Courts of Appeal for the Sixth, Seventh, and Ninth Circuits, "which have sanctioned the consideration of race in faculty employment decisions without a history of employment discrimination."

Finally, the board argued that because Taxman would have had only a 50 percent chance of keeping her job even if race had not been taken into consideration in her layoff, the Supreme Court should hold that similarly situated Title VII plaintiffs are only entitled to 50 percent of their full back pay. The Third Circuit awarded full back pay to Taxman. The board maintained that the

(more)

Third Circuit and the U.S. Court of Appeal for the District of Columbia Circuit differ on the matter.

Attorney General Janet Reno said Aug. 15 that the Justice Department was reviewing whether to file a friend-of-the court brief in the *Piscataway* case, but a DOJ spokesman told BNA Nov. 1 that the solicitor general's office had no comment on whether a brief would be filed.

The Supreme Court's public information office told BNA that there is no indication at this early date of when the court will decide whether to accept or decline the petition for review.

Barbara Yuill

End of Section

In Brief

Seattle Contractor Debarred For Three Years

Pacific Coast Feather Co. has agreed not to bid on future government contracts for three years rather than develop and maintain a written affirmative action plan as required by an executive order enforced by the Labor Department.

The Labor Department's Office of Federal Contract Compliance Programs announced the debarment in a notice in the Oct. 31 *Federal Register*.

OFCCP is part of the Labor Department's Employment Standards Administration that enforces statutes that require federal contractors and subcontractors to take extra steps to ensure minorities and women are not discriminated against. The statutes include Executive Order 112246, which requires companies that are awarded federal contracts of $50,000 or more to develop and maintain written affirmative action plans.

OFCCP said it notified Pacific Coast in March 1995 that the company had been selected for a compliance review, but when OFCCP inspectors arrived, they found the company had not created an affirmative action plan. After OFCCP issued a "show cause notice," the company told the agency that it chose not to do business with the federal government in lieu of developing and maintaining an AAP.

The company, which makes comforters and pillows, did not return BNA's phone calls.

The debarment could be lifted after three years only if the company can show it has an affirmative action plan.

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Report: Texaco Executives Caught on Tape Using Racial Slurs
Eds: NOTE contents in graphs 2, 9-10; a version also on financial wires.

NEW YORK (AP) - Senior executives at Texaco Inc. were caught on tape using racial epithets against minority workers while they discussed destroying documents about a discrimination lawsuit, The New York Times reported today.

The executives were recorded in August 1994 by a colleague, Richard A. Lundwall, who also spoke on the tapes, the Times said. The tapes, provided to the plaintiffs in the ongoing lawsuit, captured executives calling black workers "black jelly beans" and "niggers," the newspaper said.

Texaco officials said they had not heard the tapes, and didn't know if the words in the transcripts were ever said.

Andrea Christensen, a Texaco lawyer, said the company was "shocked and dismayed" by words attributed to the executives. She said they were "a clear violation of Texaco policy."

Texaco has said that it hired a lawyer to investigate whether any documents were destroyed.

Lundwall, who was senior coordinator of personnel services in Texaco's finance department, told lawyers that he taped some meetings with senior executives without their knowledge to ensure that his minutes were accurate.

In August, Lundwall provided the tapes after contacting plaintiffs' lawyers and telling them he had been fired from Texaco, according to an affidavit.

In a reference to one key document, Robert Ulrich, Texaco's treasurer, was heard saying on the tape: "All it could do is get us in trouble. That's the way I feel. I would not keep anything."

During another point in the conversation, Ulrich, who retired last year, talked about the employees who filed the lawsuit.

"This diversity thing, you know how all the black jelly beans agree," he said.

"That's funny," Lundwall replied. "All the black jelly beans seem to be glued to the bottom of the bag."

Ulrich, contacted by the Times, said he didn't know anything about the matter and declined to comment.

The class-action lawsuit was filed by black employees who work in Texaco's finance department on behalf of 1,500 blacks who work at the company. They claimed they were denied promotions and advancement opportunities because of their race.

In June, the federal Equal Employment Opportunity Commission found that the White Plains, N.Y.-based oil company had granted significantly fewer promotions between 1992 and 1994 to blacks than to other workers.

The plaintiffs have asked for sanctions against Texaco. A hearing is scheduled for Nov. 22.

WASHINGTON EDITION / LOS ANGELES TIMES

MONDAY, NOVEMBER 4, 1996

Council Votes to Keep LAPD Hiring Goals

By JODI WILGOREN and JIM NEWTON
TIMES STAFF WRITERS

Scrambling to create new Police Department goals for hiring and promoting women and minorities, the Los Angeles City Council has moved to cement ambitious hiring targets before Proposition 209 can knock them down, but did not approve efforts to impose outside limits on LAPD management.

The compromise cut Friday during a 2 1/2-hour, closed-door meeting of the council would establish new hiring goals for women and Asian Americans, extend court-ordered goals for hiring blacks and Latinos, and mandate creation of an independent unit to investigate discrimination and harassment complaints. Those goals will be part of a package submitted to a federal judge in connection with a long-standing discrimination lawsuit against the LAPD; if approved, the consent decree would be immune from state law and would be in force for 18 years.

Supporters said the most pressing issue was to get council approval on the hiring goals before Tuesday's vote on Proposition 209, a statewide initiative that would ban government affirmative action programs.

Consent decrees connected to lawsuits are exempt from Proposition 209. Hiring goals for blacks and Latinos have already been established by consent decree, but women and Asians were only covered by voluntary programs of the City Council and Police Commission. Those programs could be undone if Proposition 209 passes.

But the agreement does not include some of the more contentious elements of the proposal, such as joining plaintiffs' lawyers in hiring outside consultants to recommend new LAPD policies regarding sexual harassment and discrimination.

"We agree with the goal of ending discrimination, the goal of ending harassment, the goal of ending retaliation, the goal of making the police force look like the city as a whole in terms of women and minorities," said Councilwoman Jackie Goldberg, the driving force at City Hall behind the decree. "We left on the table how you get to those goals."

Constance Rice of the NAACP Legal Defense and Education Fund and Carol Sobel of the ACLU, two of the plaintiffs' attorneys, said they would probably endorse the council's compromise in court this week—but only as a first step.

"This statement that reaffirms equal opportunity principles, that gets you nowhere. They already have that," Rice said. "If they've left out all the things that actually mean the environment will change, this is a signal to me that they're not serious about fixing [it]."

Supporters of Proposition 209 expressed outrage at the council action.

"They made an end-run around 209 four days before election day," said Patrick J. Manshardt, an attorney with the Individual Rights Foundation.

"It's a very obvious attempt to circumvent what we expect to be a certain victory," said pro-209 campaign spokeswoman Jennifer Nelson. "They are truly trying to get around the voters' will by anticipating the victory whose outcome they may disagree with, and enacting these quotas."

The council did not reject any provisions of the proposal, only sending them back for more negotiation. But its action bodes poorly for the broader approach of the original proposal, which would grant lawyers for the plaintiffs greater involvement in departmental operations. Supporters of the full decree were unable to get the required eight votes to approve it, and it is considered unlikely that a majority of council members would approve any settlement unless it is scaled back.

Mayor Richard Riordan, who had lobbied against the proposed agreement, said he was satisfied by the council action.

"I think it's a step in the right direction," he said. Riordan stressed that he supported the sections of the proposal calling for stepped-up hiring of women and minorities but opposed sections that would have, in his estimation, given too much authority to outside entities in overseeing the LAPD.

The council agreed Friday, however, to use the consent decree process to require annual recruitment plans for women and each minority group, including a special budget, and to have by 2013 a department whose ranks reflect the gender breakdown of the county's work force overall.

"We were able to get done what we needed to get done in terms of making sure that those provisions that could be affected by Proposition 209 got passed," said Councilman Mike Hernandez, who had pushed for passage of the whole decree.

"There were important issues about recruitment and hiring that were dealt with today," agreed ACLU attorney Carol Sobel, lead counsel for the plaintiffs. "It's just easier to make the commitment before election day and not put it at risk."

Under the proposed agreement, there is no penalty for failing to meet the hiring goals as long as the city and Police Department are pursuing them in good faith.

The portions of the consent decree approved by the council must now be signed off on by the plaintiffs in the lawsuit, then return for another council vote Tuesday. Also on the docket Tuesday is a status conference in federal court in which a judge could approve the current compromise as the first step in a consent decree.

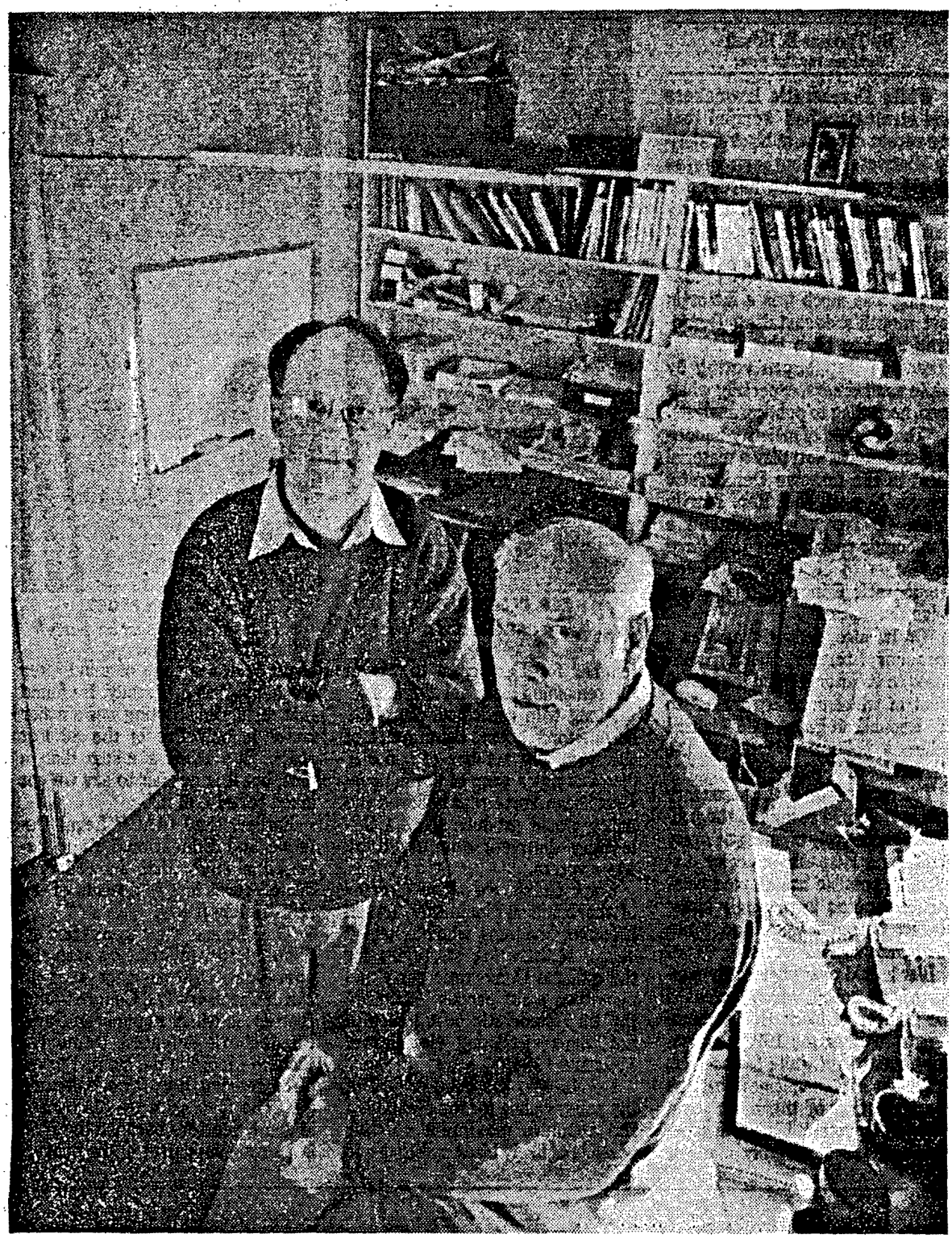
Lawmakers said they were unwilling to approve the entire 30-page consent decree Friday because it gave the ACLU and civil rights organizations too much power over LAPD decisions.

Among the items that have been sent back for further discussion are proposals to conduct attitude surveys of department personnel; allowing the plaintiffs to review promotion lists broken down by race and gender; hiring consultants to conduct training on diversity and harassment; and specifics about the discrimination unit.

Council members also were uneasy about entering into a detailed settlement without resolving the question of financial damages to the 80-plus plaintiffs in the class-action suit. Officials had estimated the cost at just implementing the remedies of the full decree at $28 million to $35 million over 18 years.

"It would be irresponsible to give a blank check on this issue and get nothing in return," said Councilman Richard Alatorre, who chairs the council's budget committee. "I support the idea of it, but we cannot just give an open book to those 80 people to sue the city."

2 of 2



BY NICK LAMMERS FOR THE WASHINGTON POST

Thomas Wood and Glynn Custred are leading the ballot effort, which they call the California Civil Rights Initiative.

with the best of the American character: to right a wrong," Custred said. "But instead we've created an apparatus that has led us down the path of Balkanization where everything is decided by race, ethnicity and gender."

Civil rights advocates, though, said the measure will further inflame fears in a state strained by racial tensions and in economic shock.

"There's a very low flash point out here," Rice said. "When you pander to the lowest primal fears, it's a dangerous situation."

She added, "How the state reacts will depend on who has the most money to support or oppose [the initiative]. That's the sad fact."

Assemblyman Bernie Richter, a Republican from Chico, introduced a similar anti-affirmative action amendment in the state Assembly in early December. His legislation would support preferences only for economically disadvantaged people applying for entry-level positions.

"I would prefer that Democrats help put this on the ballot and join us," he said. "My message to my Democratic friends is: Either support it now or be run over by it later."

Effort to Outlaw Affirmative Action Promoted in California

W Post 12/27 1/2

By John Boudreau
Special to The Washington Post

BERKELEY, Calif.—The headquarters for the California Civil Rights Initiative, a measure that would outlaw affirmative action, is located on Martin Luther King Jr. Way.

"A lot of people see an irony," says Glynn Custred, one of two scholars leading the fight to overthrow the decades-old government attempt to redress discrimination. They want to end government programs that give minority and female preference for jobs, promotions, contracts and college admissions with a proposed state constitutional amendment.

And traditional civil rights groups are taking them very seriously. California voters gave the nation a jolt from the right last month when they passed Proposition 187, which would deny non-emergency medical care and education to illegal immigrants. Now the state could be on the verge of doing it again. Conservatives hope to place the anti-affirmative action measure on the 1996 presidential primary ballot.

"The tide has turned," says Thomas Wood, executive director of the conservative California Association of Scholars and the initiative's co-architect. "There is an anti-affirmative action issue coming down the pike in California that is going to make 187 look like kindergarten."

Noting that voters here are angry and worried about their economic future, Constance Rice of the NAACP Legal Defense and Educational Fund in Los Angeles said, "This state is already dangerously polarized."

The measure, which has been endorsed by the California Republican Party, needs 615,000 valid signatures to qualify for the ballot as a statewide proposition. If approved by voters, it would bar the use of ethnicity or gender "as a criterion for either discriminating against, or granting preferential treatment to, any individual or group." It also would require agencies to reimburse legal costs of successful plaintiffs.

"Affirmative action is like the Vietnam War," said Custred, a California State University anthropology professor. "We got into it with the best of intentions. It turned into a quagmire. Now it's time to get out.

"It's reversed Jim Crow," he added. "We will never have a color-blind society. But we need a color-blind legal code."

The authors of the anti-affirmative action measure argue that affirmative action contradicts the 1964 Civil Rights Act, which prohibited discrimination for reasons of color, race, religion or national origin. In addition, they said it penalizes qualified minorities by tainting them as so-called quota hires and rarely helps the economically disadvantaged.

"People are really livid about affirmative action," Wood said. "It compromises or distorts the American principle that people shouldn't be discriminated against on the basis of their race, sex, creed or national origin."

He said he believes California's political landscape, in an era of limited dreams and resources, is fertile ground for their populist ideas. Wood and Custred are confident that California voters, who approved Proposition 187 by a 2-to-1 ratio in November, are ready to send another powerful message to the state Capitol—and beyond.

> ***"There is an anti-affirmative action issue coming down the pike ... that is going to make 187 look like kindergarten."***
>
> —co-drafter Thomas Wood

"If we get this on the ballot and raise the money and support we need, the race is ours to lose," Wood said. "I would not want to be the campaign manager for the opposition. Who wants to be opposed to equal rights?"

Civil rights advocates view the initiative as a cultural-political hand grenade.

"You can call it Willie Horton goes to college," said Eva Paterson, executive director of the Lawyers Committee for Civil Rights in San Francisco, referring to the television ad during the 1988 presidential campaign in which Massachusetts Gov. Michael S. Dukakis was attacked for allowing a convicted felon, who was black, out of prison. "It's the politics of polarization. It will re-segregate society.

"I believe affirmative action is flawed," she said. "But no one has come up with an answer for admitted racism."

Rice, the western regional counsel for the NAACP Legal Defense and Educational Fund, said that studies show that black males continue to lag behind white counterparts with equal education in terms of salaries. Affirmative action is the only way to bridge that gap and allow minorities to break into professional ranks, long the bastion of white males, she said.

"This is a door-closing measure," Rice said. "As long as the statistics are 100 percent white and male, no one ever raises the question, 'Is there anything wrong with this picture?' But as soon as you begin to level the playing field and make resources available [to minorities], all of a sudden we have a constitutional crisis. It's so hypocritical."

Custred and Wood call themselves neoconservatives. Their cramped, bare-light bulb office resembles a warren for university teaching assistants. The genial scholars emphatically rummage through piles of papers, refer to articles and books as required reading and speak with reasoned sincerity. They like to point out that their fiercest opponents have been unable to call them racists.

Wood, whose field is philosophy, said he has been denied academic appointments because he is white. "I was once told by a member of a search committee at a university, 'You'd walk into this job if you were the right gender,' " he said.

Custred said affirmative action threatens the state's educational system. He and colleagues became concerned with proposed legislation, which later failed, requiring proportional representation of minorities among public university graduates. The push for diversity, he maintained, overshadows academics. Minority students may be bumped up to a higher level of college than they are prepared for, he said.

"There are large numbers of under-prepared students coming in," Custred said. "Are we going to be a remedial institution or an institution of higher education?"

Furthermore, the two academics said they want to head off potential demagogues who could use affirmative action to fuel racism.

"Affirmative action was created

The Washington Times

DATE: 1/29/95
PAGE: 3

Pro-lifers claim double standard

Say Reno turns back on assault

By Brian Reilly
THE WASHINGTON TIMES

Local pro-life activists accuse the U.S. Justice Department of "unequal treatment" because federal agents have failed to probe reports that a man pointed a handgun at demonstrators in front of a Southeast abortion clinic last week.

Four Bible-carrying demonstrators reported the assault to D.C. police minutes after the incident last Friday, but they say that, unlike in any of the recent threats against pro-choice activists, Attorney General Janet Reno has not called federal agents into the investigation.

The FBI and other federal agencies have joined area probes into the July firebombing of a Falls Church clinic, and a task force of federal agents monitors activities of the region's more vocal pro-life activists.

Reno

"We want the Justice Department to make the same commitment to this case as they would if it were abortion-rights people who had the gun pointed at them," said the Rev. Patrick Mahoney, director of the Christian Defense Coalition. "If they were abortion-rights people, I'm convinced it would have been headline news."

A Justice Department spokesman said yesterday that agency policy forbids him from commenting on whether federal officials are investigating the assault.

Jack Humphries, a Springfield resident who puts up posters of abortion doctors around the area as part of his "No Place to Hide" campaign, says he is the victim of a baffling double standard.

Agents with the FBI and the Bureau of Alcohol, Tobacco and Firearms questioned him shortly after somone torched canisters of gasoline in front of the Commonwealth Women's Clinic July 29, Mr. Humphries said yesterday.

But he has not heard from any federal authorities in the week since he was standing in front of the Hillcrest clinic in Southeast and "stared down the barrel of a gun."

Mr. Humphries, 44, and three other members of a Northern Virginia pro-life organization, circled in front of the Hillcrest clinic last Friday morning in an attempt to "persuade" women not to seek abortions, he said.

While talking with the others, he noticed a man in a hooded parka stepping out of a white car parked in the lot in front of a next-door convenience store. The man shouted a string of obscenities at the demonstrators and then walked inside the store.

Mr. Humphries said the demonstrators did not reply. But a police spokesman quoted a police report as saying the men were invovled in a "verbal altercation" before the gun incident.

The three men and one woman continued talking in front of the clinic and, according to the report filed with the Metropolitan Police Department, the white car slowly drove past the front of the clinic and the man in the parka leaned out the passenger window and pointed a gun at the demonstrators.

The Washington Times

DATE: 1-20-95
PAGE: A-1

House to look at affirmative action, quotas

By Nancy E. Roman
THE WASHINGTON TIMES

Two House Republican committee chairmen said yesterday they will hold hearings, as early as March, on the Justice Department's civil rights agenda in an effort to redirect the Clinton administration's policies on quotas and racial preferences.

Rep. Bill Goodling, chairman of the Labor and Empowerment Committee, said the hearings may lead to amending civil rights laws or drafting new legislation so that race-based firing is no longer permissible.

"If the old civil rights legislation is not helping, hearings could lead to legislative action," the Pennsylvania Republican said.

Rep. Henry J. Hyde, chairman of the House Judiciary Committee, singled out two "disturbing developments" in the Justice Department's enforcement of civil rights law:

- The Piscataway, N.J., case in which a white high school business teacher was fired based on her race. Under President Bush, the Justice Department argued that the teacher was unfairly discriminated against based on her race. The Clinton Justice Department reversed that position and now argues that race-based firing is permissible even when the employer has no history of past discrimination.
- The Chevy Chase Bank case, in which the department repudiated the bank for not having enough branches in predominantly black areas. The department imposed an unprecedented quota: It mandated black employees at all levels of the bank's operation, advertisements in black publications and radio stations, and marketing to black real estate agents. It also required Chevy Chase personnel to attend sensitivity and diversity seminars.

"This is just two examples of the way the current administration is reaching to the uttermost points of the galaxy on making quotas the operative principle of civil rights enforcement," the Illinois Republican told a group gathered at a civil rights briefing sponsored by the Institute for Justice in the Capitol. "We should ... see if we haven't reached a point where the vision of the Declaration of Independence of equal protection of the law is not being distorted in the name of ideology."

Calling civil rights "a formidable and emotional problem," Mr. Hyde decried the Clinton administration Justice Department's enforcement of civil rights law.

"We have a two-year window of opportunity to do something about it," he told a group gathered in the Capitol yesterday at a civil rights briefing sponsored by the Institute for Justice.

William Mellor, president of the Institute for Justice, said the Goodling hearings will be instrumental in mobilizing public opinion against the "activist quota-based agenda of the Clinton administration."

"That will lead to a demand from the public that these practices cease and desist," he said.

The Small Business Committee will also hold hearings on the roles of set-asides in awards to small businesses. Mr. Hyde has not yet scheduled hearings before the Judiciary Committee.

At yesterday's briefing, conservative politicians and policy experts differed on how quickly Republicans will be able to redirect the civil rights agenda.

William Kristol, chairman of the Project for the Republican Future, said there is an "understandable skepticism" about whether Republicans will do anything to move away from quotas. He said President Nixon committed to fighting quotas but did not. President Reagan also made stabs at stopping quotas, but ultimately "let society slide down the same path we'd been on." Mr. Kristol, former chief of staff to Vice President Dan Quayle, noted that the GOP's "Contract With America" does not address civil rights.

"Critics will say this is just talk, but the political will is not there," he said.

But he said time has shown that affirmative-action schemes once intended as temporary remedies to past discrimination have failed. "Also, the extraordinary election was a referendum on big-government intrusion into day-to-day lives of Americans," he said.

Clint Bolick, vice president of the Institute for Justice, said Republicans have lacked a coherent, forward-looking agenda.

"For too long Republicans have been paralyzed by fear and guilt into retreating from their core principles," he said. "If they persist, they will miss a golden opportunity not only to claim voters alienated by divisive civil rights policies, but, more importantly, to expand and diversify their base."

A host of conservative and libertarian policy analysts offered guidance to Congress yesterday.

Linda Chavez, executive director of the Center for Equal Opportunity, said the problem with affirmative-action plans is that they do not benefit society's disadvantaged.

"They benefit educated, middle-class minorities like me and my children who without those programs could also succeed," she said, adding that foreign-born minorities can qualify for scholarship programs at state universities.

"We need to be honest about that," she said. "Are we willing to compromise our principles to help people who can make it on their own?"

Abigail Thernstrom, policy analyst at the Manhattan Institute, said districts drawn to elect minorities to Congress are also bad policy. She said they benefit black and Hispanic politicians, not black and Hispanic voters.

Associated Press

In New Hampshire to announce formation of a Presidential campaign committee, Lamar Alexander shows an envelope containing registration papers to be mailed to the Federal Election Commission.

Ex-Gov. Alexander Moves Toward '96 Run

Special to The New York Times

BEDFORD, N.H., Jan. 17 — Former Gov. Lamar Alexander of Tennessee today announced the formation of a 1996 Republican Presidential campaign committee.

Although he stopped short of formally declaring his candidacy, the 54-year-old Mr. Alexander sounded very much like a candidate in a speech here, saying he had come to New Hampshire, long the state with the earliest Presidential primaries, because it was "the traditional place to start a Presidential bid."

By creating a committee and registering it with the Federal Election Commission, Mr. Alexander can begin raising campaign money and would be eligible for Federal matching funds if his spending were kept within specified limits during the primary season.

In his speech, Mr. Alexander, who was Education Secretary in the Bush Administration, said it was time for the Government to give more control to the states. He advocated a part-time Congress, made up of citizen-lawmakers who earn their living at home and spend only six months of the year in Washington.

A Grand Party as Gov. Bush Is Sworn In

By SAM HOWE VERHOVEK

Special to The New York Times

AUSTIN, Tex., Jan. 17 — George Walker Bush was sworn in as Texas's 46th Governor today, vowing to "use every resource at my disposal to make the Federal Government in Washington heed this simple truth: Texans can run Texas."

The 48-year-old Mr. Bush, only the state's second Republican Governor since Reconstruction, strode to the podium under raised swords and the six flags of Texas with his wife, Laura, followed by his twin teen-age daughters, Jenna and Barbara. Later they celebrated with a parade, three inaugural balls, a barbecue and a Mexican-style luncheon on the State Capitol grounds for roughly 9,000 of his closest friends.

Former President George Bush and his wife, Barbara, sat beaming in the front row of the podium as their eldest son was sworn in.

Governor Bush's predecessor, Ann W. Richards, the Democrat whom he ousted in November's election, was not present at the swearing-in, an absence that aides to her and Mr. Bush said was customary for departing governors. Mr. Bush praised her in his speech for giving "heart to those who battle adversity and hope to those who wonder if opportunity is limited."

Ms. Richards, who vacated the Governor's mansion last week, was in California today working on future plans that are expected to keep her in the public eye, on the speech circuit and in television commercials. She says she has no intention of running for public office again.

After acknowledging his family, Governor Bush introduced five "special guests," the Mexican Governors of states along or near the Texas border.

"Their presence is a clear sign of the importance of the relationship between Texas and Mexico," Mr. Bush said. "Friends bring out the best in each other. May our friendship bring much good to both of our countries."

Mexico gets about half of all its American imports from Texas. During his campaign, Mr. Bush repeatedly emphasized his state's economic and cultural links to Mexico and said he would oppose any measure like California's Proposition 187 aimed at cracking down on services to illegal immigrants.

Minutes before Mr. Bush was sworn in, Chief Justice Thomas R. Phillips administered the oath to the popularly elected Lieutenant Governor, Bob Bullock, a Democrat who has broad powers under the state's constitution. Mr. Bush and Mr. Bullock will have to negotiate a potentially thorny agenda in the coming weeks that includes everything from a welfare overhaul and school financing to a court-ordered Congressional redistricting plan.

Today's inaugural marked the beginning of a new era of political ascendancy for the Grand Old Party in Texas. For the first time, the Governor and two United States Senators are Republicans.

In his brief speech, Mr. Bush offered no specific promises, although he said he wants to usher in an era of "personal responsibility." And he suggested that changing a welfare system that "diminishes personal responsibility and rewards illegitimacy" would be a top priority.

"For the last 30 years, our culture has steadily replaced personal responsibility with collective guilt," he said. "The new freedom Texas seeks must be matched with renewed personal responsibility. The very future of our society depends on it."

The new Governor also contended that Federal requirements were too burdensome on the states, and he vowed to fight for tort revamping that would bring a halt to "junk lawsuits that clog our courts and threaten our producers."

Texas's new Governor emphasizes close ties with Mexico.

Mr. Bush, who has resigned his position as managing partner of the Texas Rangers baseball club, has never held elective office before.

"He doesn't have much of a track record, but it looks as if his style is closer to his father than to Newt Gingrich in the sense that he's taken relatively modest positions on a lot of issues," said Bruce Buchanan, a professor of government at the University of Texas at Austin. "This guy is more likely to be a moderate centrist than a firebrand."

The invocation at the noontime swearing-in was delivered by the Rev. Billy Graham. After the service, Mr. Bush held a private luncheon at the Governor's Mansion and then attended an inaugural parade downtown.

Among those in the crowd today, dressed in his trademark 10-gallon hat, was Clayton Williams, who narrowly lost to Ms. Richards four years ago in a memorably raucous campaign that made last November's encounter seem downright genteel by comparison. "I made some mistakes," said Mr. Williams, a West Texas oilman. "I've drilled dry holes before. You make them, you fill them and you go forward."

At the inaugural balls and at a gala Monday night, titled "What Texans Can Dream, Texans Can Do" (a line Mr. Bush used over and over on the campaign trail), country was the dominant music form. Among the entertainers were the Dixie Chicks, the Oak Ridge Boys, the Geezinslaw Brothers, and Johnny D and the Rocket 88's.

Asked on Monday if he had taken dancing lessons to prepare for today's celebrations, Mr. Bush said only: "The last time I danced was when I got married. This will be the last time I dance for probably another 17 years."

LEGACIES

Fathers' Footsteps: Other Political Families

George W. Bush, the new Governor of Texas, is the first Presidential offspring to be elected governor of a state. In addition to Mr. Bush, there have been one President, two Senators and six members of the House of Representatives whose fathers were President.

John Quincy Adams

FATHER	SON
John Adams President, 1797–1801	**John Quincy Adams** Senator, Mass., 1803–1808
	President, 1825–1829
	Representative, Mass., 1831–1848
John Quincy Adams President, 1825–1829	**Charles Francis Adams** Representative, Mass., 1859–1861
William Henry Harrison President, March 4–April 4, 1841	**John Scott Harrison** Representative, Ohio, 1853–1857
John Tyler President, 1841–1845	**David Gardiner Tyler** Representative, Va., 1893–1897
William Howard Taft President, 1909–1913	**Robert Alphonso Taft** Senator, Ohio, 1939–1953
Franklin Delano Roosevelt President, 1933–1945	**Franklin Delano Roosevelt Jr.** Representative, N.Y., 1949–1955
	James Roosevelt Representative, Calif., 1955–1965

Source: "Facts About the Presidents," Joseph Nathan Kane

The New York Times

Affirmative Action Challenge Seems to Perplex High Court

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Jan. 17 — As a vehicle for a major Supreme Court pronouncement on the constitutionality of Government-sponsored affirmative action, a case that came before the Court today appeared an unlikely, even a poor candidate by the end of an hourlong argument that left some of the Court's strongest opponents of affirmative action visibly frustrated.

"We may have a case here in which we can't decide an issue we thought we were going to decide," Justice Antonin Scalia said at one point after Solicitor General Drew S. Days 3d, defending the highway construction program at issue on behalf of the Clinton Administration, said the case might not properly be before the Court.

Based on the Constitution's guarantee of equal protection, the case is a challenge by a white contractor to a Federal program that offers a financial bonus to general contractors on Federal projects who subcontract part of the work to small companies that have been certified as "disadvantaged business enterprises."

The white-owned construction company, Adarand Constructors, of Colorado Springs, underbid a Hispanic-owned company by $1,700 on a $100,000 Federal highway guardrail project in southwestern Colorado. But Adarand lost the job because the general contractor chose to earn a $10,000 bonus by hiring the "disadvantaged business," the Gonzales Construction Company.

Under the Federal Small Business Act and a 1987 Federal highway law, the category of "disadvantaged business enterprise" is not based exclusively on race and can include white-owned companies. Companies owned by members of racial and ethnic minority groups are presumed to be "socially and economically disadvantaged," although that presumption is open to challenge as applied to any particular company. Adarand did not bring such a challenge but went to Federal court with its constitutional case instead, challenging what it described as an unconstitutional preference on the basis of race.

Two lower Federal courts in Colorado ruled against the company on the basis of Supreme Court precedent. So when the Justices agreed last September to hear Adarand's appeal, the constitutional and practical stakes were obviously substantial, not only for Adarand and the small business contracting program but for the increasingly tenuous underpinning for Government-sponsored affirmative action in general.

Support on the Court for affirmative action, never enthusiastic even when the Court's membership was markedly more liberal, has dwindled to the vanishing point over the last five years. Minority set-aside programs administered by state and local governments must meet stringent tests under a 1989 Supreme Court decision, City of Richmond v. Croson. Federal Government programs have remained subject to a less exacting standard of review, but the Court's willingness to adhere to those precedents is open to substantial question.

A sweeping ruling appears unlikely in a case challenging racial incentives.

But the moment of truth for Federal affirmative action may not yet have arrived. The argument today made clear that the Adarand case has procedural problems and factual idiosyncracies that threaten either to derail it or to produce a decision of less than sweeping significance.

The most obvious problem is the question of whether Adarand had standing to bring its challenge in the first place, since it failed to show in the lower courts that the Gonzales Construction Company had been included in the "disadvantaged business" category because of race or that it did not deserve to be on the list for racially neutral reasons.

Several Justices suggested by their questions that since Adarand is challenging the presumptive equation of race with economic disadvantage, it should be required to show that the presumption worked to Adarand's disadvantage in this case and that Gonzales did not have another valid basis for its inclusion on the special subcontractor list. The Clinton Administration has strongly argued this point in its effort to minimize the potential impact of the case.

Another factor that makes a sweeping ruling less likely is the operation of the law itself, which does not work as a mandatory set-aside or numerical quota. The Small Business Act program differs from the program the Court considered in its most directly relevant precedent, a 1980 decision called Fullilove v. Klutznick, in which the Court upheld a requirement that 10 percent of the money spent on a Federal public works program go to companies owned by members of minority groups.

Under the Small Business Act, by contrast, the general contractors are not required to participate, and race gives only a presumptive rather than an automatic preference.

William Perry Pendley, the Adarand company's lawyer, had apparently made a strategic decision not to ask the Court to overrule the Fullilove decision in this case, Adarand Constructors v. Peña, No. 93-1841. But that left him in the awkward position of arguing that the Court could strike down the Small Business Act program without disturbing the Fullilove precedent.

A Justice suggests that the Court may be unable to decide an issue.

"But how can you say that?" Justice Ruth Bader Ginsburg asked Mr. Pendley. "Fullilove involved a straight-out set-aside, with no flexibility at all," she continued. "Here, it's as flexible as possible."

Mr. Pendley replied that the prime contractor is "economically compelled" as a practical matter to agree to hire a minority subcontractor in order to qualify for the bonus, which can be as much as 2 percent of the total contract. He also argued that the law's provision for challenges to be brought to the designation of a minority-owned company as a disadvantaged business enterprise was "not consistent with the real world" because, without subpoena power or the ability to gather information, small white-owned companies like his client could not make such challenges.

Several Justices, including Sandra Day O'Connor, whose vote may well control the outcome of the case, questioned Solicitor General Days closely about the means for bringing challenges. Mr. Days said the regulations for the program listed 25 reasons for removing a company's eligibility to participate. He said that "hundreds" of companies have been removed. But he could not cite a specific challenge that had been brought by a competing subcontractor.

"What limit is there, if any, to the Government's ability to use race as a presumption in its programs?" Justice Scalia asked Mr. Days. He asked whether the space program, with a "critical need for perfection," could employ a presumption that whites, because they are generally better educated, should be hired, although non-whites would be free to try to prove that they were qualified.

"You're overlooking the remedial purpose" of the contracting program at issue, Mr. Days replied. He said that had a "unique and comprehensive power to legislate to remedy the effects of racial discrimination."

"No question," Justice Scalia said, "but can it do it through race-based presumptions?"

Yes, Mr. Days replied, citing the Fullilove case as a precedent.

There was one light moment during the argument, when Justice David H. Souter asked Mr. Pendley to identify the "flaw" in the statute. Justice Souter is a New Hampshire native who, like his fellow northern New Englanders, drops final "r's" from some words and adds them to others.

Mr. Pendley looked puzzled. "Excuse me, the *floor*?" he repeated.

No, *flaw*, Justice Souter said, this time in standard English. "Excuse me, it's my regional accent," he said, grinning.

THE NEW YORK TIMES, WEDNESDAY, JANUARY 18, 1995

A Sober Inauguration in Texas

Gov. Bush Stresses Themes of 'Personal Responsibility' and 'Discipline'

By Sue Anne Pressley
Washington Post Staff Writer

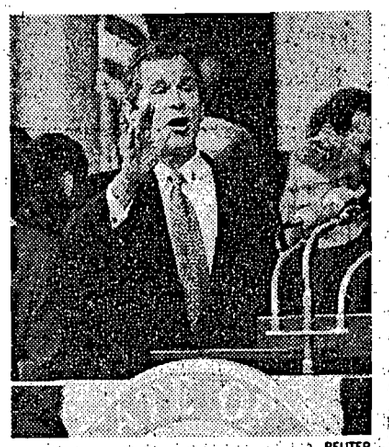
AUSTIN, Tex., Jan. 17—As his famous parents watched with tears of pride, George W. Bush, son of the former president, assumed a new and powerful identity today as governor of the nation's second-largest state.

Bush, 48, a Yale-educated former oilman who likes to state his preference for cowboy boots over boating shoes, was sworn into office in a noon ceremony that restored a Republican to the chief executive's post for only the third time since Reconstruction.

But while his decisive victory last November by 350,000 votes over popular Democratic Gov. Ann Richards was seen as potent proof of the Republican ascendancy nationwide, Bush steered clear today of partisan labels or boasting. Declaring himself the "Personal Responsibility Governor"—a marked contrast to Richards's colorful celebration four years ago of a culturally diverse "New Texas"—Bush reiterated his sober, hard-edged philosophy for guiding the state through the last half of the 1990s.

It was a festive day in Texas politics as Bush, Lt. Gov. Bob Bullock (D) and the Democratic-controlled legislature joined hands and pledged a fruitful lawmaking session; as the Texas A&M band played and the inaugural parade wound around the Capitol; and as Bush's special guests—ranging from evangelist Billy Graham to actor Chuck Norris, star of the television series, "Walker, Texas Ranger"—gathered here to celebrate. But underlying the gaiety was Bush's insistence that new attitudes must prevail if Texas and its people are to prosper.

In his brief inaugural speech, which he largely wrote, Bush talked about "consequences," about "discipline" and about "renewed personal responsibility"—themes that fit the personality of the highly organized, always-punctual candidate who began his well-plotted campaign for the governorship precisely one year to the day before the Nov. 8 election. He also talked about "commitment," "prayer," "hard work" and "the need to get Washington to heed this simple truth—Texans can run Texas." But mostly he talked about responsibility.



REUTER

Gov. George W. Bush waves to well-wishers after being sworn in.

"The very future of our society depends on it," he said, "and responsibility starts at home. It starts with responsible families. Every piece of legislation that crosses my desk will be judged by whether it keeps our families together safe and strong. . . . If we are to save our young people, we must show them that discipline and love go hand-in-hand."

It was a theme that meshed perfectly with Jim and Joan Gatton's view of the world. The Gattons, of Houston—he's an architect, she "a first-class homemaker," he said—are Republicans who voted for Bush, and although they are not active party workers they felt compelled to attend the inauguration.

"He speaks for us, he reflects our views," Joan Gatton said. "Individual responsibility, that a person has to accept the consequences and the rewards of his actions. So many people have gotten so far away from that basic."

"Absolutely," Jim Gatton said. "It's something the whole nation needs."

In the Bush view of Texas, personal responsibility means local school districts should have more control over education. It means the welfare system must be drastically cut, limiting to two years benefits paid to women with children older than 3, requiring mothers to identify the father of each child and revoking the driving or hunting licenses of parents delinquent in paying child support. It means cracking down on juvenile crime, lowering the age at which a youth can be tried as an adult from 15 to 14, creating "tough-love academies" operated by retired drill sergeants and adding 3,500 beds to the state's juvenile center capacity. And it means pushing for tort reforms that will make it more difficult for the angry and vindictive to file "frivolous lawsuits."

"These should not be viewed as Republican ideas," he said, "but good, conservative-thought ideas. I intend to speak in philosophical terms, and not in partisan terms."

The Texas he now heads has a thriving, expanding economy, and one common joke from politicians this inaugural day had to do with the fact Bush was the only governor in recent memory to enter office not facing a looming budget crisis.

In his determined drive to the governorship, Bush fended off charges he was capitalizing on his famous political name and that, as a part-owner of the Texas Rangers baseball team, he had never attended a budget hearing or a legislative session. But Bush said he has prepared for his new job and its responsibilities as meticulously as he does for everything else and has turned to some unusual sources for guidance. Some good advice, he said, has come from a biography of Teddy Roosevelt he is reading.

For political pointers, he can also turn to his family. "Mom and Dad," as he addressed the former president and First Lady, George and Barbara Bush, sat proudly on the Capitol stage, along with Jeb Bush, the younger brother who lost his bid in November for the governorship of Florida, and more than a dozen other Bushes.

Also in attendance were past governors of Texas—including Democrat Mark White and Bill Clements, the only other Republican in recent history, who was elected in 1978 and again in 1986. Notably absent, however, was Ann Richards.

Her office confirmed only that Richards was away in California. But the hot rumor of the day was that the flamboyant former governor was in Hollywood to tape a Doritos corn chips commercial that will air during the Super Bowl game.

CORRECTION

The caramel-fudge brownies recipe that appears on Page E4 of today's Food Section is incorrect. It should call for ⅓ cup of milk, not a whole cup.

Justices Show Division On Race-Based Policies

Preferences for Minority Contractors Debated

By Joan Biskupic
Washington Post Staff Writer

Justice Antonin Scalia, playing the devil's advocate in a case yesterday on racial hiring, asked whether the federal government could adopt a policy of preference for white applicants.

Scalia told the government's lawyer to suppose that the space agency, because of a need for perfection, presumed that whites are more educated than blacks and would be better-suited for a job. How would that differ from a contracting program that presumes blacks and Hispanics are economically disadvantaged?

The difference, said Solicitor General Drew S. Days III, is that the policy presuming minorities are disadvantaged—which he was defending yesterday—is "attempting to remedy racial discrimination." He emphasized Congress's "unique and comprehensive" power to help the victims of segregation's vestiges and continued prejudice.

Yesterday's arguments revealed how divided the Supreme Court is on race-based preferences and how close the justices are to reversing the effects of a 1980 decision that first endorsed federal set-asides and prompted numerous states and local governments to give minority preferences in contracting.

Conflict over the validity of affirmative action has been building nationwide and the courtroom was packed yesterday. Retired Justice William J. Brennan Jr., a liberal bulwark who had written a 1990 opinion upholding race preferences, was there. In frail health and using a wheelchair, Brennan was stone still as he watched the give-and-take.

The Transportation Department practice at issue gives money bonuses to prime contractors on federal deals that subcontract with "disadvantaged" companies. The underlying policy presumes that blacks, Hispanics, American Indians and Asians are "disadvantaged." It was challenged by a white-owned construction firm that lost a guardrail project in the San Juan National Forest in southern Colorado.

The company, Adarand Constructors, submitted the low bid but was bypassed by the prime contractor in favor of a Hispanic firm. By hiring the minority-owned company, the prime contractor made an extra $10,000 from the government.

Adarand's lawyer, William Perry Pendley, told the justices yesterday the policy was based on an "impermissible racial stereotype" that violated the Constitution's guarantee of equal protection of the laws.

Days argued that the program, arising from a 1978 small-business law, is a constitutional effort to compensate for "well-documented discrimination." (As an assistant attorney general in the Carter administration, Days successfully argued the 1980 case that gave Congress broad latitude to use racial criteria to remedy discrimination.)

The court has changed dramatically since the 1980s, and a majority of the justices have made clear in various ways their abhorrence for racial classifications.

As he has done in recent cases, Justice David H. Souter, who succeeded Brennan in 1990, picked up the mantle for the more liberal minority. Souter questioned whether Adarand had adequately demonstrated that it lost the contract because of the presumption of minority disadvantage. Pendley insisted that was indisputable.

Souter also emphasized that the government's policy says the presumption can be overturned if proof emerges that the company has no economic disadvantage.

He favorably compared the transportation bonus to the public works program upheld in 1980. Pendley said it was hard for private firms like Adarand to collect data and evidence sufficient to challenge another company's "disadvantaged" status. He added that a company like Adarand could be blackballed for the effort.

Days acknowledged under questioning that he did not know of any third party that had successfully challenged an award.

To Chief Justice William H. Rehnquist's questions about why the government did not target small, struggling companies, irrespective of race, Days said the reality was that federal procurement dollars were not getting to minority firms that had been subject to historic discrimination.

In 1990, when the Supreme Court last upheld a federal race preference, in broadcast licenses, it was by one vote. Only one member of that five-justice majority remains, John Paul Stevens. The four dissenters—Rehnquist, Scalia, Sandra Day O'Connor and Anthony M. Kennedy, who said distinctions based on race are dangerous—are still on the court. Clarence Thomas, who came onto the court in 1991, opposes affirmative action.

A decision in the case, *Adarand Constructors v. Peña*, is expected by late June.

Separately yesterday, the court without comment let stand a child-pornography conviction in a highly publicized case involving videotapes in which the subjects never appeared nude. The case attracted great congressional scrutiny and national attention after the Clinton administration twice amended its definition of hard-core pornography.

Yesterday's action in *Knox v. United States* left intact a Pennsylvania man's conviction for buying videos that focused on the genital areas of scantily clad young girls.

The Justice Department initially asserted that the standard used to convict Stephen V. Knox was impermissibly broad, but after great public uproar, it submitted a brief endorsing Knox's conviction.

SUPREME COURT CALENDAR

The Supreme Court will hear oral argument today from 10 a.m. to noon in the following cases:

Nos. 93-1408, 93-1414, 93-1415. The consolidated cases in *New York State Conference of Blue Cross & Blue Shield Plans v. The Travelers Insurance.* Whether federal law relating to insurance plans preempts New York state's hospital surcharge system, which was intended to reduce medical costs and increase the ability of poor people to get care. (One hour.)

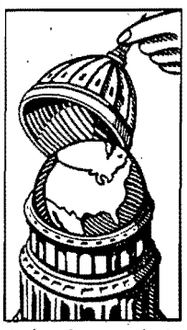
No. 93-1883. *Anderson v. Edwards.* Whether a state can reduce certain welfare benefits by grouping together all sibling and non-sibling children who live in a house together. (One hour.)

CAPITAL JOURNAL
By Gerald F. Seib

Drug Comeback: One Sad Trend Lost in Shuffle

THE NEW CONGRESS isn't exactly short of things to do, but here's one task crying out for attention: putting a stop to the backsliding underway in the national war against drugs.

Subtly, almost imperceptibly, drug use is creeping back up among America's youth. Worse yet, all the warning signs of bigger problems ahead are flashing. Use of marijuana, often a precursor of cocaine use, is up sharply among teens. Simultaneously, young people's perception that drugs are risky is declining, an attitude change that usually forecasts an actual upturn in drug use.



At least one powerful voice is trying to persuade the new, Republican-controlled Congress to fix its eyes on this troubling picture. The voice belongs to William Bennett, the former drug czar, who has been pressing new GOP members to get drugs onto at least their second 100 days' agenda. His message, Mr. Bennett says, is simply this: "You cannot ignore it."

In truth, though, ignoring the problem is what a lot of people, in Congress and out, have been doing. Consequently, the country is in a position roughly akin to that of a drug abuser who may appear to be recovering but who actually is in grave danger of a relapse.

Over the last few years, it was possible to conclude that, outside of the inner cities, broader American society had finally turned the tide in its long battle against illegal drugs. Studies by the University of Michigan Institute for Social Research, for instance, showed that drug use among high school seniors declined gradually but steadily through the second half of the 1980s and into the 1990s. Not coincidentally, perceptions that regular drug use was risky rose through the same period.

NOW, THOSE comforting trendlines have turned. The University of Michigan research shows that illicit drug use has been rising, slowly but clearly, among eighth and 10th graders and high school seniors in each of the last two years. Particularly alarming was the rise found in the use of marijuana. Over the past two to three years, the share of students reporting use of marijuana at least once in the past year has doubled among eighth graders, grown by two-thirds among 10th graders, and jumped by 40% among high school seniors.

The rise in marijuana use is particularly troubling, because historical trends show that marijuana is a "gateway" drug often leading to other drugs. Recent studies by Columbia University's Center on Addiction and Substance Abuse, or CASA, document a link between marijuana, as well as alcohol and tobacco, and later cocaine use. To put a grim human face on the latest statistics, CASA estimates that the jump in youthful marijuana use means 820,000 more young Americans will try cocaine in their lifetime, and that 58,000 of them will become regular cocaine users as

Why is this happening? The best guess is the broadest one. The country is letting down its collective guard.

FOR STARTERS, society generally has stopped pounding home the theme that drugs are dangerous, meaning that a whole new set of young Americans isn't getting the same kind of clear signal their older brothers and sisters did. "The message is getting mixed," frets Joseph Califano, the former health, education and welfare secretary and CASA's chairman. "It's everything from the fact that we're starting to see pot come back to the movies and the music business, which are incredibly important to young people, to the fact that Jocelyn Elders is sending out an ambiguous message."

Surgeon General Elders has just departed, of course, so now it's up to President Clinton and his administration to undo any damage her casual remarks about possible drug legalization may have done. But the problem is hardly confined to the Clinton administration. Congress is equally complicit in toning down the anti-drug message.

In the budget he presented for the current fiscal year, Mr. Clinton proposed spending $659.2 million on a program to help ensure safe and drug-free schools. Congress last year chopped that request down by 27%, to $482 million.

Now comes the new Republican Congress, which will be torn between its budget-cutting impulses and the painful fact that programs to interdict drugs and prevent their use cost money. This is one area where anti-crime bromides alone won't suffice. Some in the drug-fighting community are particularly worried that, as spending on federal social programs gets packed into block grants and shipped out to the states, drug-fighting will get pushed to the back of the line of competing claims.

For his part, Mr. Bennett suggests that existing federal and state law-enforcement money could be used for a "targeted, intense effort at closing down drug markets in the cities." The first battle, though, isn't against drug dealers. It's against creeping national complacency.

Ruff to Assist Magaziner In Task Force Investigation

By a Wall Street Journal *Staff Reporter*

WASHINGTON – Criminal-defense attorney Charles Ruff will help White House aide Ira Magaziner fight a criminal investigation of whether he purposely lied during litigation over the White House's health-reform task force.

Mr. Ruff, a former Watergate special prosecutor, confirmed that he has been representing Mr. Magaziner for about two weeks and has met with Federal District Judge Royce Lamberth, who ordered the probe last month. Judge Lamberth concluded that Mr. Magaziner wasn't being truthful in a March 1993 sworn declaration when he said that all members of the task force were government employees or consultants, and that the consultants had no supervisory or decision-making authority.

However, the judge said it would be up to U.S. Attorney Eric Holder to decide whether Mr. Magaziner lied intentionally and if so, to charge him with perjury, contempt of court or making false statements. Mr. Holder's office is reviewing the case. Judge Lamberth delayed a decision that he said in December he would impose on the government for misconduct.

Mr. Ruff is a partner at the Washington law firm **Covington & Burling**.

FDA Reduces Time For Approving Drugs, Biological Products

By a Wall Street Journal *Staff Reporter*

WASHINGTON – The Food and Drug Administration said it has substantially speeded up the approval of new drugs and biological products.

The agency, in a review of its 1994 performance, said it approved 85 drugs and biological products, which includes items such as vaccines. The median time for the 62 drug approvals was 19 months, about 20% less time than the year before. The median approval time for the 23 biological products was 12.2 months, about half the time it took for similar approvals in 1993.

The agency attributed the acceleration to the user-fee program, under which manufacturers pay fees to help finance the approval process. The program, approved by Congress in 1992, got under way in July 1993 and is paying for the hiring of additional FDA review staff.

A spokesman for Pharmaceutical Research and Manufacturers of America, which represents drug makers, said that the industry believes the FDA is making a "good faith effort" but that much more improvement is needed. The group is having a news conference today to highlight its concerns.

Former Sen. Baker Hired By Long-Distance Carriers

By a Wall Street Journal *Staff Reporter*

WASHINGTON – Long-distance telephone companies hired former Republican Sen. Howard H. Baker to represent them in a Congress that's moving to deregulate potential rivals.

Mr. Baker is scheduled to announce today that he'll serve as chairman of the Competitive Long Distance Coalition, a year-old organization seeking to dissuade Congress from rapidly opening the long-distance market to competition from the regional Bell companies. The Baby Bells, lobbying under the name Alliance for Competitive Communication, say they face enough local competition to win access to long distance.

Also expected to join the coalition is John C. Tuck, a member of Mr. Baker's lobbying firm. Mr. Tuck is former Senate aide to Mr. Baker who also handled legislative issues at the White House when Mr. Baker served as President Reagan's chief of staff.

Mr. Tuck and Mr. Baker, a former AT&T Corp. board member, will have to work to keep the long-distance coalition together. The members, including AT&T, **MCI Communications** Corp., **Sprint** Corp. and a host of smaller telecommunications resellers, criticize each other in advertising and don't always see eye-to-eye on regulatory matters.

Suits Pit National Security Against Environmental Law

By VIVECA NOVAK
Staff Reporter of THE WALL STREET JOURNAL

How do you sue the government over a military facility that's linked to spy planes and UFOs – but is so shrouded in secrecy that the government refuses to acknowledge its existence?

Jonathan Turley, a public-interest lawyer who teaches at George Washington University's National Law Center, is trying with two lawsuits now pending in federal court in Las Vegas. They're among only a few such actions ever filed against the Pentagon's "black budget" of top-secret programs.

Six civilian Air Force workers Mr. Turley is representing allege that their severe skin ailments were caused by exposure to fumes from illegal, open-pit burning of hazardous waste at a supersecret Air Force facility in Nevada. A seventh plaintiff, the widow of a former worker, charges that the toxic fumes contributed to her husband's early death.

The cases, Mr. Turley says, could set important precedents about the extent to which national-security privilege can be used to dodge environmental and other laws. "This case has little to do with national security and a great deal to do with accountability within the governmental system," he says.

But because government lawyers have threatened to charge his clients with violating laws against disclosing classified information, Mr. Turley hasn't even named the six workers. Referred to in court papers only as John Does, they won't testify at any trial. The widow of former worker Robert Frost can be identified because he's deceased. (According to Mr. Turley, medical experts found potentially lethal levels of dioxins and dibenzofurans, which were among the poisonous compounds allegedly emitted at the site, in Mr. Frost's body.)

Mr. Turley brought two suits in the hope of pitting two government agencies against each other, and in the ensuing struggle, improving his chances of clearing his first hurdle – to force the government to confirm the existence of the military base by name.

One suit filed against military officials, including Defense Secretary William Perry, charges that the repeated burning of solvents, plastics, tires and other hazardous materials at the site violated the Resource Conservation and Recovery Act. The second suit, against Environmental Protection Agency Administrator Carol Browner, alleges that the agency violated the same statute by failing to inspect the site.

"We filed two separate actions in this litigation precisely because the institutional interests of EPA and the military are distinct and in conflict," says Mr. Turley. "EPA clearly has an institutional interest to inspect and inventory all federal facilities, including black programs."

Mr. Turley added another factor that could boost his case. With help from his clients and a group called the Project on Government Oversight, he developed what he characterizes as a criminal environmental case against the military and its contractors at the site and turned it over to the EPA. The agency, along with a Justice Department lawyer, are pursuing an investigation, he says. The EPA and the Justice Department decline to comment.

For years, military officials wouldn't confirm that the site even exists; recently they have acknowledged that some activity takes place in the area, but they won't say what it is or name the facility. Military analysts and Air Force personnel call it "Area 51" or "Dreamland."

Area 51 lies northwest of Las Vegas on bone-dry land called Groom Lake. It is the birthplace of cloak-and-dagger technology such as the U-2 spy plane, the SR-71 Blackbird and the Stealth fighter-bomber, say military analysts. They say a new hypersonic spy plane, Aurora, is being developed there now. A cadre of UFO enthusiasts think the base is also where the government studies captured alien spaceships.

Mr. Turley's double-pronged strategy was snarled, he says, when the government assigned defense of both suits to a single military lawyer detailed to the Justice Department, Lt. Col. Richard Sarver. In a motion filed last week, Mr. Turley did something rarely tried against the government: He asked the judge to disqualify Col. Sarver and his team of lawyers, claiming that the EPA and the Air Force have different and very likely conflicting interests in the cases.

The question of whether a single Justice Department lawyer can represent multiple agencies with various interests – an especially thorny question when the government is both the regulator and the regulated party – feeds into a long-simmering debate about whether government lawyers are subject to local bar rules. Col. Sarver has said that he is following Justice Department internal guidelines, not bar rules on conflicts of interest. But Mr. Turley has gotten a preliminary opinion from the District of Columbia Bar's ethics committee that local rules cover government lawyers and "reject the commonly espoused proposition that the government lawyer's client is the entire government."

Legal ethicists disagree about how conflict-of-interest rules should apply to the government, but many agree with Mr. Turley that the consent of the government agencies to joint representation may not suffice.

"The judge has to weigh whether [Col. Sarver] can adequately represent both the military and the EPA, without compromising either client's interest or the court's ability to come up with a fair decision on the merits," says John Dzienkowski, a legal ethics expert at the University of Texas Law School.

Mr. Turley wants the military and the EPA to use different teams of Justice Department lawyers with a Chinese wall between them. Meanwhile, Col. Sarver has tried but failed to get the suits dismissed on national-security grounds. It's a theme that will surely resurface as the cases come down to specifics.

Mr. Turley is proceeding with discovery. His single question in interrogatories to the defendants asked for the name of the facility. Defendants have responded by saying only that they "don't understand the question," he says. At trial, he plans to introduce declassified Soviet satellite photos to establish the site's existence.

Affirmative-Action Plan Is Assailed In Supreme Court

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – A top Clinton administration lawyer encountered hostility from some Supreme Court justices when he defended a federal construction program that favors minority road builders.

In oral arguments, Solicitor General Drew Days stressed that as a technical matter, the program under attack benefits socially and economically "disadvantaged" companies, and doesn't amount to reverse discrimination against whites.

But conservative members of the high court fired back that the program hinges on race because it assumes that blacks and other minorities are disadvantaged.

Mr. Days stumbled when asked whether white-owned companies could effectively object to a successful minority-owned competitor being classified as disadvantaged. "You don't know of any" examples, snapped Justice Antonin Scalia. "That's correct," Mr. Days conceded, quickly adding that government procurement officers have rejected some minority companies that don't need special help.

The case was brought by Randy Pech, a white Colorado man who installs highway guardrails and claims to have lost business because of racial preferences. It has been one of the most closely watched cases of the Supreme Court's 1994-95 term, and a decision is expected by July.

Unless a procedural issue sidetracks the court, there appear to be at least five votes to roll back federal affirmative action: those of Chief Justice William Rehnquist and Justices Scalia, Clarence Thomas, Anthony Kennedy and Sandra Day O'Connor.

The high-court case illustrates the difficult choices facing the administration on affirmative action. Republicans bolstered by their sweeping November victory are planning to assault affirmative-action policies not only in courts – a process under way for some years – but also in Congress and the states.

The White House hasn't settled on a comprehensive strategy to respond to the coming offensive. Some administration officials privately insist that to keep the traditional Democratic base of black and women voters, as well as members of public-employee unions, Mr. Clinton has to fight the antiaffirmative-action push. Other Clinton aides, however, contend he should concede that some programs aren't effective or fair and need reform.

Mr. Days yesterday offered an understated defense, lacking any powerful appeal for the need to use affirmative action to achieve equity in the marketplace. He got some tentative support from the more centrist justices.

The construction program at issue provides a 1.5% premium to prime contractors that give 10% or more of their subcontracts to minority-owned firms. Mr. Pech submitted the low bid for the guardrail work on a project in southwest Colorado, but the job was given to a Hispanic competitor.

(Adarand Constructors Inc. vs. Pena)

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California Civil Rights Initiative targets affirmative action

By K.L. Billingsley
THE WASHINGTON TIMES

Promoters of a new civil-rights initiative enter 1995 confident that their measure will help cultivate a colorblind society and eliminate racial quotas. But opponents already are taking aim at the measure, slated for the California ballot in 1996.

The California Civil Rights Initiative forbids the state to use "race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group" in employment, contracts and education.

Thomas Wood, executive director of the California Association of Scholars, and Glynn Custred, a California State University anthropology professor, are the prime movers of the initiative.

They cite widespread dissatisfaction with a "racial and ethnic spoils system" supported by a politically correct "diversity industry" that allows some groups to be discriminated against in the name of affirmative action.

"The American people have never had a chance to go into the voting booth and say, 'I don't like this stuff,' " Mr. Wood said. "One out of three Americans claims to be a victim of reverse discrimination."

Some of the initiative's most eloquent proponents are minorities.

"The time has come for change," said James Coleman of the Black Education Commission of the Los Angeles Unified School District. "Those of African descent should be in the forefront to let the world know we are not morally or intellectually deficient. We can see ourselves as equal."

"Race is often the dominant, almost the sole factor in higher education," said Ward Connerly, a black businessman and member of the University of California Board of Regents. "The notion that affirmative action is a victimless crime is false. It's tearing our society apart."

Mr. Connerly said that at a recent University of California board meeting it was argued that the purpose of affirmative action is not to remedy past discrimination, but to promote educational diversity.

"It has become a goal in and of itself," he said.

The initiative must get more than 600,000 signatures to qualify for the ballot, and this month promoters will file papers with the state. As they make what Mr. Custred calls their "opening moves on the chess board," supporters haven't decided whether to aim for the March or November ballot in 1996.

Last year, the California Republican and Libertarian parties voted unanimously to support the initiative. "Liberals are terrified of it," said Mr. Wood, but the promoters cite some interest from Democratic leaders.

"It's a unifying issue for Republicans, a divisive issue for Democrats," said Mr. Wood, who welcomes support from "liberal centrists," such as Sacramento Bee writers Dan Walters and Peter Schrag.

"This is more interesting than Proposition 187," said Mr. Wood, referring to the measure — passed overwhelmingly by California voters in November — to deny most public services to illegal immigrants.

"There is some affirmative action and immigration link," Mr. Wood said. "People crossing the border are immediately eligible for preferences."

While Proposition 187 was being challenged in the courts, promoters of the civil-rights proposal relied heavily on the language of the 1964 Civil Rights Act and took care to leave all federal and state civil rights protections intact.

Supporters of the measure predict it could be bigger than Proposition 13, the tax-revolt initiative that swept eastward from the Golden State in the late 1970s. But critics see it as a major threat.

"Affirmative action is about making the distribution of goodies in society more equitable," said Eva Paterson of the Bay Area chapter of the Lawyers Committee for Civil Rights. Miss Paterson said the effect of the initiative "will be to resegregate society."

"It's another race-baiting proposition," D.C. Delegate Eleanor Holmes Norton said Dec. 31 on CNN's "Both Sides" program with Jesse Jackson.

"It will lead to the kind of race war that you must want in California," Mrs. Norton told Mr. Wood during the show.

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Yager argues that overtime payments were originally needed "for the protection of people on the lower rungs of the economic ladder." Today, he said, some people earning $100,000 a year or more can make overtime pay, while others earning much less can't. He said the goal was to make determining eligibility simple, and to relieve employers from legal liability for not complying with standards that do not fit the modern workplace.

How organized labor and the Clinton administration will react to all this isn't clear, although the unions are almost certain to oppose most of the proposed changes. The administration is apt to be a different story. The Labor Department has been pushing changes that encourage flexibility in the workplace and may find some parts of the proposal to its liking.

The response will crystallize when the Republicans introduce their bill. As even Yager acknowledged, "the devil is in the details."

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Black regent favors ending affirmative-action programs

By Dexter Waugh
SAN FRANCISCO EXAMINER

SAN FRANCISCO — Ward Connerly, one of three blacks on the University of California board of regents, wants to scrap all affirmative-action programs in the UC system.

The issue is set to be discussed at the regents' meeting next week in San Francisco, and is already stirring debate among Mr. Connerly's colleagues on the board, students and community activists.

"Affirmative action in hiring, firing, promotion, compensation, admissions, contracting — I am saying the University of California should not take factors of race and gender and ethnicity into account in any of those transactions," Mr. Connerly said in an interview.

"Affirmative action was probably justified 20 years ago or whenever to change the culture of our public institutions," he said. "We've reached a point now of diminishing returns, because people don't subscribe to it."

By June, Mr. Connerly hopes to have a formal proposal to phase out affirmative action by a certain date. But he wants regents to start the debate now.

"I think he has a problem," said Regent Alice Gonzales. "I don't have the same problem. I think in many cases youngsters who come from Hispanic or black background need to have other things than their grades considered, such as their contributions to their community, what other things have they done, why were they not at the top of their class — was it because they had to work?

"I don't view affirmative action as allowing people who aren't going to succeed into the system. I am not prepared to just dismiss [affirmative action], and I don't think the university system is, either."

Mark Schlosberg, a junior in economics at UC-Berkeley, said: "I'm a white male. I come from a middle-class family. ... I know people from all different sorts of backgrounds [at Berkeley], and I think one of the reasons is the admissions policy. It encourages a very diverse student body."

Mr. Connerly said his move was "totally independent" of two current efforts to ban all state affirmative-action programs — a proposed constitutional amendment by Republican Assemblyman Bernie Richter and the California Civil Rights Initiative, written by two Bay Area academics, which would accomplish the same thing.

Mr. Connerly, a Sacramento businessman, was appointed to the regents in 1993 by his longtime friend Gov. Pete Wilson, who two weeks ago also called for an end to affirmative action. However, Mr. Connerly said he had spoken out against affirmative action before Mr. Wilson had.

Regent David Flinn said he believed Mr. Connerly's proposal would be taken seriously, given Proposition 187's overwhelming passage and Republican victories in November.

Mr. Flinn said there was a "strong probability" voters would approve the civil rights initiative.

"I think the regents have to begin preparing the university for that day," he said. "We have to look at programs and see if we can design them to be concerned more with disadvantaged people rather than race, or concerned with special talents rather than the race of people with special talents. I hope it doesn't mean a huge departure from now, but some departure."

If his position were put to the electorate, Mr. Connerly said, "the public will vote for it 80 percent, in my view."

There have been student affirmative-action programs at UC since the mid-1960s. They vary from campus to campus within system guidelines. At UC-Berkeley, for instance, half the freshman class is selected on a competitive basis. Berkeley admits the other 50 percent on the basis of grades, test scores and 10 other criteria.

Only one of the 10 criteria deals with "underrepresented minorities." The other categories include athletics, special talents such as musical ability, whether a student comes from a rural high school, is economically disadvantaged, disabled or an older, reentry student.

L. Ling-Chi Wang, an associate professor of Asian-American studies at Berkeley, said eliminating these categories "would be devastating in terms of student diversity."

"It would affect the athletic programs, the marching band and orchestra and all those chamber groups; the student body will be predominantly urban rather than rural; the disabled will not be able to get in," Mr. Wang said. "It will be just so devastating."

Mr. Connerly does not support "totally throwing this out the door without something in place." He favors expanding outreach programs designed to increase college eligibility among minority high school students and "doing some other things to insure we move to the next stage."

"I don't see this as a step backward," he said. "I see it as a step forward."

• *Distributed by Scripps Howard.*

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Court to mull minority preferences

By Frank J. Murray
THE WASHINGTON TIMES

Randy Pech doesn't think the U.S. Department of Transportation should pay 10 percent extra to get highway guardrails installed by contractors who are black, Hispanic or female.

Mr. Pech is a white man who is general manager and part owner of Adarand Constructors Inc. of Colorado Springs, which lost a $104,800 job to a Hispanic-owned form that overbid him.

Supreme Court justices will consider Adarand's experience during arguments this morning on a politically supercharged affirmative-action case that could affect billions of dollars in federally assisted contracting.

Former U.S. Rep. Parren Mitchell of Maryland, who says he wrote the bill that created the program, told demonstrators outside the Supreme Court yesterday that he fears the justices will overturn it because they have become "a political mouthpiece for the racists and bigots."

A crowd of 400 to 500 well-dressed protesters carried signs that said "Stop the economic lynching."

"We're here ... to demand that the Supreme Court stop its vendetta against black people and all the other minorities," Mr. Mitchell told the low-key rally. "Racism is alive and well, and it sits on those seats in the Supreme Court."

The court has been inundated by legal briefs from an extraordinary 22 interest groups across the political spectrum. They include the Congressional Black Caucus as well as a coalition of 14 states and the District. The coalition argues for affirmative action in a brief by Maryland Assistant Attorney General Evelyn O. Cannon.

The highway subcontract Mr. Pech sought for Adarand was a relatively small job in the remote San Juan National Forest, 400 miles from Denver. It went in September 1989 to Gonzales Construction, which charged more, and the general contractor got a $10,000 bonus for hiring a minority firm assumed to be "disadvantaged."

Mr. Pech made a federal case out of it:

- He challenged the open-ended 13-year-old program allowing federal agencies to pay bonuses to non-minority general contractors for parceling subcontracts to

Are all nonwhites 'disadvantaged'?

firms owned by Burmese, Laotians, Indians and countless other ethnic groups.

- He asked justices to decide whether all minority-owned-and-controlled businesses should automatically be considered "disadvantaged" firms worthy of preferential treatment.

"Former Justice Lewis F. Powell said the day cannot come too soon when the government stops judging people on the basis of race. What this case will decide is whether that day has come in America," William P. Pendley of the Mountain States Legal Foundation said in an interview.

Mr. Pendley said Gonzales Construction, which got the contract with the preference in 1989, often wins in straight bidding against Adarand and doesn't need federal help.

Regional programs attacked directly in this lawsuit spend about $55 million a year in the Western states, and the entire federally assisted highways program spends perhaps $15 billion a year, the lawyer said.

"If the court goes our way, all those programs will be unconstitutional," said Mr. Pendley, whose foundation is representing Adarand for free.

Solicitor General Drew S. Days III says the program favors "disadvantaged status" regardless of race, but he concedes that any minority contractor filing for certification as disadvantaged is assumed to be deserving.

"Race plays a role in the operation of the clause only through a rebuttable presumption that small businesses owned and controlled by members of racial minority groups are disadvantaged," Mr. Days' brief said.

He said competitors may attack that presumption, but Adarand's owners say that would be unwise, and futile even if they won.

"They don't have the time or expertise or the energy to challenge Gonzales' status and would become labeled with a black mark as a litigious subcontractor if they did," he said.

The government "argues that bribing a prime contractor with federal funds to discriminate is less constitutionally offensive than direct discrimination by the U.S. government," said Mr. Pendley's legal brief.

The government also argued that Adarand's interest is too narrow to justify attention by the Supreme Court, unlike that of Associated General Contractors, which represented more than 200 companies in a Jacksonville, Fla., case that addressed similar questions in a state law.

AGC, with 30,000 contractor members, has filed friend-of-the-court arguments that line up with Adarand's.

The association's brief says it is "disingenuous in the extreme" for Mr. Days to claim that there is no social or cultural balancing and that the program is not race-based.

THE NATION'S NEWSPAPER
USA TODAY

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In court: Civil rights of whites

Contractor vs. racial preference

By Tony Mauro
USA TODAY

Randy Pech stands as a prime example of the leading political symbol of the day: the angry white male.

Pech is angry that his Colorado Springs business, Adarand Constructors Inc., lost a federal road-building contract because he is white. He sued, and today the Supreme Court will consider his case in a crucial test of whether affirmative action programs violate the civil rights of whites.

"It totally rubs me the wrong way for the government to encourage discrimination against me based on my race," says Pech, 40. "We're not allowed to discriminate, but the government does it all the time."

Pech's complaint couldn't come at a worse time for civil rights advocates, who point to affirmative action programs as job-creating success stories on the road to racial equality.

Thousands of minority-owned businesses have sprung up, eligible for more than $13 billion in federal funds each year, as well as state, local and private-sector benefits.

In Congress and at the state level — it may go on the ballot next year in California — affirmative action programs giving minorities an advantage in jobs and benefits are under assault.

And at the Supreme Court, which embraced affirmative action in the 1978 *Bakke* case as a remedy for past discrimination, the mood is changing.

Four of five justices who voted for affirmative action when it last came up in 1990 have retired from the court. Among the replacements is Clarence Thomas, the nine-member court's only black member. He opposes racial preferences and could tip the balance.

"This case could significantly alter what has become the largest social engineering program in American history," says Fred Lynch of Claremont McKenna College, author of a book on affirmative action.

"There has not been another time in history when there has been such a significant shift in the ideology of the court," says Todd Welch of the Mountain States Legal Foundation, which is representing Pech.

The dispute began when Mountain Gravel & Construction Co., prime contractor for a federal highway job, sought bids for subcontractors to do guardrail work. Pech's company was low bidder at $102,000.

The contract went instead to a Hispanic-owned firm. The federal road program gave Mountain Gravel a $10,000 bonus for giving work to a "disadvantaged business enterprise."

Pech says he might understand the racial preference if minority contractors were struggling in Colorado. But he says in his segment of the industry, his is the only white-owned firm left, while minority-owned firms are thriving.

But affirmative action or set-aside programs get fewer than 1% of federal procurement dollars, says Anthony Robinson of the Minority Business Enterprise Legal Defense and Education Fund.

"Absent these programs, minority businesses will not be used," he says. "You do business with people you are comfortable with. That's how it is."

Increasingly, though, the Supreme Court has become uncomfortable with government actions that show preference for one race. In a 1993 voting rights case, the court frowned on redrawing congressional districts solely to boost chances of minority candidates.

The Clinton administration strongly defends the program, arguing it benefits the disadvantaged, no matter what their race — a broader category used in an increasing number of set-aside programs.

Welch insists the program is based on race and violates the Constitution. He says there is no evidence any white-owned company has ever been deemed disadvantaged under the road program.

Civil rights advocates hope for a ruling that won't do away with all race-conscious affirmative action programs.

If Pech wins in a broad ruling, says Stephen Ralston of the NAACP Legal Defense Fund, "It's hard to see how any program that even thinks of race could survive."

Since 1978, Congress has said these agencies should steer at least 5% of their funds—and at the Transportation Department, at least 10%—to small businesses owned by minorities.

In the case before the court, Adarand Constructors vs. Federico Pena, 93-1841, lawyers for Pech are challenging the legal mechanism that steers contracts to "disadvantaged business enterprises," which are defined as those owned by "black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities."

To achieve its goal, the Transportation Department awards prime contractors with a bonus of up to 10% if they in turn hire minority-owned firms.

"It works like a bribe," said Denver attorney William Perry Pendley, who is representing Pech.

Although Pech submitted a slightly lower bid to build the guardrails along a stretch of Colorado highway, the prime contractor won the bonus by giving the work to the minority-owned firm.

In defense of the program, lawyers for the Clinton Administration say it is targeted at disadvantaged businesses and it "does not involve a fixed quota or a set-aside."

In his brief, Solicitor General Drew S. Days III urges the court to preserve the power of Congress and federal agencies "to act in an affirmative, race-conscious manner."

It is hard to forecast the outcome of the case, despite the clearly changed character of the court. Where the Supreme Court is concerned, four plus one does not always equal five.

"I think there is a working majority now" to bar most legal preferences based on race, said Washington attorney Carter G. Phillips. "But it's a fragile majority."

Most of the uncertainty revolves around O'Connor, who, unlike the other conservatives, has voted on occasion to uphold some affirmative action. She is also renowned for writing "on the one hand, on the other hand" opinions that allow both sides to claim victory.

In 1989, O'Connor wrote a 5-4 opinion that struck down a minority set-aside program in Richmond, Va., and ruled that racial discrimination by state and local governments should be judged the same, regardless of whether whites or blacks are victims. This legal standard seemed to doom most city and state programs that explicitly benefit minorities.

However, she went on to say that in extreme cases, where statistics show minorities have been excluded from construction work, cities can target funds to minority-owned firms.

Her words in the case of Richmond vs. Croson have spawned a new industry of so-called "Croson studies." Most big cities have paid consultants to compile data showing that minority firms get only a small amount of business. With these studies in hand, most cities have maintained their efforts to steer some funding to businesses owned by minorities or women.

Still, a broad ruling in the Colorado case, perhaps written by Rehnquist, has the potential to undercut virtually all government programs that give explicit preferences to minorities.

"He's been fighting these [programs] since he came on the court," Phillips said of Rehnquist, a justice since 1972. "He might figure the time has come to finally do away with them."

Later this year, the court is also expected to rule on whether states can use race to design electoral districts specifically to ensure that minorities are in the majority and whether state colleges can use scholarships reserved for minority students.

On Capitol Hill, the new Republican majority is also likely to repeal at least some programs that have benefited minorities.

"We're talking about a broad prohibition on racial preferences in federal contracts," said Clint Bolick, a lawyer for the Institute for Justice, a conservative group that is working on the legislative proposals.

But it is important to note that neither the court rulings nor the legislation will directly affect affirmative action by private employers.

In 1978, the high court interpreted the federal job-discrimination laws so as to allow preferences in favor of minorities and women, and the court has shown no inclination to revisit those rulings.

But the Constitution limits what the government can do, and the more conservative justices have made it clear they do not believe explicit racial distinctions are allowed.

As a dismayed Justice Kennedy wrote when the court narrowly upheld affirmative action in 1990: "I regret that after a century of judicial opinions, we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign.'"

Los Angeles Times

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'Colorblind' Constitution Faces Test in Altered Light, by Altered Court

■ **Law:** Conservative justices may dismantle affirmative action. Their tool is a doctrine meant to aid minorities.

By DAVID G. SAVAGE
TIMES STAFF WRITER

WASHINGTON—For two-thirds of this century, civil rights lawyers, liberal judges and legal scholars contended the Constitution was "colorblind," citing the ringing words of dissent from Justice John Marshall Harlan in the Plessy vs. Ferguson case of 1896.

Refusing to endorse legal segregation on Louisiana's railroads, Harlan wrote: "Our Constitution is color blind. In respect of civil rights, all citizens are equal. The law regards man as man and takes no account of his surroundings or his color."

In the 1950s, then-lawyer Thurgood Marshall invoked the theory of the colorblind Constitution when he made his successful attack on school segregation before the high court.

Legal distinctions "made on a racial basis or on the basis of ancestry are odious and invidious," he told the justices in the landmark case Brown vs. Board of Education.

But since the 1970s, it has been conservative—not liberal—lawyers, judges and legal scholars who have invoked the colorblind Constitution. They have argued that minorities cannot be singled out by the law—even if the law gives them preference, as in the case of affirmative action.

This year, 99 years after Plessy vs. Ferguson, the Supreme Court may finally have a solid majority to rule that the colorblind principle is the law, regardless of who benefits.

If the conservative majority holds together, a ruling barring legal preferences based on race could affect billions of dollars in government contracts, as well as the employment prospects for millions of public employees.

Perhaps even more significant, a broad court ruling striking down federal preferences based on race could signal a retreat from the nation's 20-year experiment with official affirmative action.

While the justices are not reconsidering affirmative action by private employers, some legal experts believe even such voluntary programs could be undermined by a strong repudiation of government efforts.

Begun quietly under Presidents Lyndon B. Johnson and Richard Nixon to remedy blatant bias and open the doors to minorities, affirmative action blossomed in the 1970s with a series of federal programs that reserved a percentage of contracts and jobs for blacks, Latinos and other minorities.

Colleges, universities and most private employers followed with a variety of programs designed to increase the number of minorities on campus or on the job.

But these programs were originally conceived as temporary measures. And their critics, bolstered by the conservative political tide, say their time is up.

"That is the major question before the court," said Notre Dame University law professor Douglas Kmiec. "Is the Constitution in 1995 colorblind, even if society is not there yet? Is it time to say race is an irrelevant factor in government decision-making?"

The first test will come today, when the justices hear arguments on behalf of a white road-builder from Colorado, who submitted a low bid to erect guardrails along a federal highway but lost out to Gonzales Construction Co., a Latino-owned firm, because of a preference program.

"I'm not mad at minorities, but I don't feel the government should be encouraging discrimination," said Randy Pech, the road-builder. "This has been happening to me 15 years, and I don't see it ending."

But many legal experts think it could end this year because of the markedly changed makeup of the Supreme Court.

Just five years ago, the high court narrowly upheld "benign race-conscious" federal programs that benefit minorities.

That ruling prompted a strong dissent from four conservatives, who accused the majority of "welcoming the return of racial classifications to the nation's laws."

"At the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class," Justice Sandra Day O'Connor said in dissent. She was joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Anthony M. Kennedy.

In July, 1990, three weeks after the opinion upholding benign discrimination, its author, 84-year-old Justice William J. Brennan, suffered a stroke and was forced to step down. A year later, Justice Thurgood Marshall joined him in retirement. Byron R. White and Harry A. Blackmun followed after that. Now, only one justice, John Paul Stevens, is left from the majority that upheld affirmative action.

And the conservatives have been bolstered by Justice Clarence Thomas, who has publicly endorsed the colorblind principle in lawmaking.

"If there was ever an opportunity to do something, this is it," said Ohio State University law professor Michael Rose, who filed a brief on behalf of conservative academics urging the court to outlaw official affirmative action.

Minority advocates, looking at the same changed court, are worried about the outcome.

Later this year, the court is also expected to rule on whether states can use race to design electoral districts specifically to ensure that minorities are in the majority and whether state colleges can use scholarships reserved for minority students.

A ruling in favor of Pech "could doom practically everything so that you couldn't even think about race," said Stephen Ralston, senior staff attorney for the National Assn. for the Advancement of Colored People's Legal Defense Fund in New York.

The Washington-based Minority Business Enterprise Legal Defense Fund sent a memo to its members last month, saying that "your survival as a minority entrepreneur and the survival of our business community are at stake."

For fiscal 1993, the U.S. Small Business Administration said, the 18 major federal departments awarded $10.5 billion, or 5.3% of the total, in contracts to firms owned by minorities or women.

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ences than to those of state and local governments. The court in 1989, with Stevens's vote, struck down a Richmond, Va., public works program that set aside 30 percent of construction funds for minority contractors.

Solicitor General Drew S. Days III, who will defend the federal transportation program today, has emphasized congressional power in this area and noted that lawmakers found that economic and social disadvantage "is highly correlated with race."

Days said that while the government presumes that certain minorities (specifically blacks, Hispanics, Native Americans and Asians) are disadvantaged in this country, that presumption can be overturned if proof emerges that the company has no social or economic disadvantage.

"[C]ongress recognized . . . that not all minority group members have equally borne the brunt of racial discrimination," Days told the justices in his brief.

But Pech counters, "It's not up to me to challenge a 'disadvantaged' status." His lawyer, William Perry Pendley, added, "He is in the position of building guardrails. He is not in the position of gathering data and engaging in litigation."

Pendley, of the Mountain States Legal Foundation, is urging the court to review the federal program with the same strict scrutiny the justices have said state and local affirmative action policies deserve.

Days argues that the economic position of minorities, relative to whites, has worsened through the decades and unemployment continues to affect blacks and Hispanics at a greater rate than whites.

The Washington Post

DATE: 1-17-95
PAGE: A-1

Court to Rule On Race-Based Public Policy

By Joan Biskupic
Washington Post Staff Writer

DENVER—Randy Pech said he was tired of losing highway construction projects to companies owned by Hispanics or blacks even when his company had submitted the lowest bid.

"In the early 1980s when I first heard 'You were low, but we had to give it to a minority company,' I flipped," said Pech, 40, who is white. Pech manages a guardrail construction firm and is at the center of a pivotal Supreme Court case on government policies that encourage race-based preferences.

The dispute, to be heard today, comes to the high court at a time of increased public and judicial apprehension about race-conscious decisions—in contracting and procurement, scholarships and other social policies. Affirmative action blossomed in the 1960s and 1970s as federal lawmakers tried to compensate for the remnants of segregation, prejudice in the "old boys' network," and other attitudes that were thought to make it hard for minority-owned businesses to prosper.

Now, conflict over such programs is building nationwide. Politicians, responding to what they perceive to be the message from the most recent elections and opinion polls, are rethinking measures that were designed to remedy America's history of racism. Fears about "reverse discrimination" are at the fore. Some members of Congress have proposed abolishing federal race preferences, and in California a citizens' group is pushing an amendment to the state constitution that would end programs that give minorities and women preference for jobs, contracts and college admissions.

Pech quit college in 1976 to begin Adarand Constructors with his father and a friend. Just as he was building up the Colorado Springs-based firm, government programs that disfavored white men were gaining momentum. He complained about it "to anyone who would listen," he said.

"And my wife and father-in-law said, 'You should do something.' "

In 1990, Pech submitted a low bid but still lost a subcontract on a federal project in the San Juan National Forest in southern Colorado. He then sued the Transportation Department over a policy that gives money bonuses to prime contractors that hire "disadvantaged" companies. Racial and ethnic minorities are presumed to be disadvantaged under the program.

Pech lost in lower courts, but last fall the Supreme Court agreed to hear his argument that the government violated the constitutional guarantee of equal protection of the laws. The question is whether Congress was right to adopt, as part of a 1978 small-business law, a presumption that minority-run businesses are disadvantaged and deserving of special government assistance. As set in motion by the Transportation Department, the policy provides bonuses to government contractors that subcontract at least 10 percent of their work to disadvantaged firms. If the bonus is bigger than the difference between the lowest bid and the bid of the disadvantaged firm, the general contractor can make more money hiring the minority firm.

"This case is very likely to be a turning point," said Susan Low Bloch, a Georgetown University law professor who teaches a class on race and the Constitution. She noted that four justices who voted to uphold federal racial preferences in the court's last case on the subject, in 1990, have retired. But she said, "It's more than just the numbers. The times have changed."

Polls show that many whites think racial and ethnic minorities now have the same opportunities as whites. A Times Mirror survey last year, for example, said 51 percent of the whites interviewed agreed with the statement that equal rights had been pushed too far. It was reportedly the first time in the seven years of the poll that a majority of whites had taken such a position against special benefits for racial minorities.

Some federal courts recently have given greater scrutiny to such programs. Last October, an appeals court rejected a University of Maryland scholarship program exclusively for blacks.

The trends have civil rights activists and minority contractors uneasy about the new case, *Adarand Constructors v. Pena*.

"In the broadest sense . . . the effect of racism in this country is under review," the National Association of Minority Businesses said in a "friend of the court" brief.

Another group, the National Coalition of Minority Businesses told the justices that ending the highway bonus program and other race-based preferences would have "a devastating impact on a major segment of the minority community and the economic health of numerous diverse communities throughout the nation."

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The justices who hold the balance of power on today's court have stressed that it is important to treat all citizens as individuals, not as part of a class. There is no such thing as a "benign" racial classification, Justice Sandra Day O'Connor wrote in 1990, in a dissenting opinion to a decision allowing racial preferences in federal broadcast licenses. She was joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Anthony M. Kennedy.

"Governmental distinctions among citizens based on race or ethnicity . . . exact costs and carry with them substantial dangers," O'Connor said. "To the person denied an opportunity or right based on race, the classification is hardly benign."

The addition to the court of Justice Clarence Thomas, who abhors racial classifications, may tip the balance to rejection of the federal bonus program. Further, the other new justices—David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer—are collectively more conservative than their predecessors, who in the 1970s and 1980s helped shape public policy on racial preferences.

The ninth justice, John Paul Stevens, has been a swing vote, helping to set a standard of more judicial deference to congressional racial prefer-

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The New York Times

DATE: 1.15.95
PAGE: 19

Tribe Sues to Expand Hunting and Fishing

MADISON, Wis., Jan. 14 (AP) — The Menominee Indians have filed a lawsuit in Federal District Court here, seeking clearance to hunt and fish on nonreservation land under tribal law rather than state rules.

The suit was filed on Friday.

Tribal rights off reservations have been revived in recent years for other Indians, leading to confrontations with non-Indian sportsmen, who are more restricted by state laws.

The 7,000-member Menominee tribe said it had received rights to hunt and fish off its reservation in eastern and central Wisconsin in treaties with the United States Government from 1831 to 1854.

Bruce Greene of Boulder, Colo., a lawyer for the tribe, contended that the rights remained in effect and that the United States Court of Appeals for the Seventh Circuit upheld that principle in 1983 for the Chippewa Indians of Wisconsin.

The Wisconsin Attorney General, James Doyle Jr., said he expected to dispute the Menominee claim in court.

The Washington Post

DATE: 1/13/95
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Welfare Debate Moves to Capitol Hill

As Hearings Open, Rival Plans Vie to Remake Decades of Social Policy

By Barbara Vobejda
and Judith Havemann
Washington Post Staff Writers

Fresh from a meeting with congressional leaders last week, Wisconsin Gov. Tommy G. Thompson (R) swept his arms from left to right, gesturing to show the dramatic shift that has taken place in the debate over how to rebuild America's welfare system.

"We made a light-year of advance in the last three months," Thompson said. "I never thought I would see the day."

As Congress opens its hearings on welfare reform this morning, the discussion has moved far beyond the changes proposed by President Clinton last June, driven by the Republican electoral victory and a bipartisan recognition of the popularity of the issue.

The contentious fight that lies ahead is over deeply held beliefs about the role of government and its treatment of the nation's disadvantaged population. Congressional Republicans want not only to cut costs, but create policies that discourage welfare dependence and attack what they see as a national crisis—the increase in out-of-wedlock births. Republicans, however, do not agree on the best way to accomplish this.

Governors like Thompson argue that they know best how to accomplish these goals and that Washington should turn over the money to them with few strings attached. And on the sidelines are the people who began this debate, President Clinton and the Democrats, who are struggling to secure a role in the process.

Whatever the outcome, the debate that begins before a House Ways and Means human resources subcommittee is itself historic, a wholesale rethinking of four decades of social policy. Prompted by growing welfare rolls and increasing costs, elected leaders across the political spectrum agree on the need to change what they say is a deeply flawed program.

"We ended welfare as we know it in 1988, but six to seven years later it is clear that we did not really change the system," said Ways and Means Committee Chairman Bill Archer (R-Tex.), referring to passage of the Family Support Act, the last round of welfare reform. Welfare, he said, "remains a cruel hoax that hurts its own beneficiaries."

But the Republican proposals before the committee are stirring enormous controversy. If conservatives are celebrating the competition in Washington to offer more and more revolutionary plans, liberals are wincing at the prospect of families pushed off the welfare rolls.

Major battles are brewing over a number of issues, including the wisdom of providing unrestricted cash payments to the states and whether it is fair to deny benefits to unwed teenage mothers, children whose paternity has not been established and legal immigrants who have not become citizens.

Still, the enthusiasm—among Democrats and Republicans—to rewrite welfare policy is somewhat reminiscent of the euphoria early in the health care debate last year.

Rep. E. Clay Shaw Jr. (R-Fla.), who will chair the hearings, said at a briefing for reporters yesterday that he wants to "break down partisan lines" because "everybody is trying to move the welfare reform agenda."

But, as in health care reform, the euphoria could wither when details of the plan are scrutinized.

"I think we may be in for the same kind of gut-wrenching debate on welfare that we had on health care reform and come out producing a mouse," said Robert H. Haveman, economics professor at the University of Wisconsin's Institute for Research on Poverty.

Already, there is some disarray among Republicans. Although the proposal contained in the GOP "Contract With America" calls for cutting off cash assistance to legal immigrants who have not become citizens, House Speaker Newt Gingrich (R-Ga.) said Monday he thought the party should "revisit the question" of a permanent ban on non-citizen benefits.

But Shaw said he had no plans to remove it from the bill. "I am not going to take an offhand comment at a press conference as instructions," he said. And Archer said, "we do not believe that people who come to this country for opportunity and freedom should expect a handout."

Democrats have their own problems of disarray, and some are decrying the lack of leadership from President Clinton on the issue.

"The White House has not gotten together to come up with an alternative," said Rep. Charles B. Rangel (D-N.Y.), a member of the subcommittee. "The Democrats in the House have not gotten together to come up with an alternative. . . . Everybody is so stunned by defeat we have become incoherent."

The debate in Washington will ultimately be felt on a diverse collection of disadvantaged families across the country. The largest program, Aid to Families with Dependent Children, includes 14 million recipients, nearly 70 percent of them children.

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The Washington Times

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WILLIAM RUSHER

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Dwindling popularity

When the Civil Rights Act of 1964 was passed, critics warned it would not merely outlaw discrimination against racial and other minorities but would be used to favor blacks (for example) over more highly qualified whites.

Sen. Hubert Humphrey and other proponents of the act swore up and down that it would do no such thing: that, on the contrary, its whole purpose was to render America "colorblind" — i.e., to make sure that race would no longer be a factor in such crucial fields as employment and college admission.

The subsequent history of civil rights in America makes it clear that, on this point at least, the act's critics were right and its proponents wrong.

First, the courts quickly (and rightly) ruled that specific, demonstrated instances of bias could be remedied by consciously favoring members of the group discriminated against until the results of bias were statistically eliminated. Nothing wrong with that.

Republican leaders are beginning to recognize that this is an issue whose time may well have come.

But then, over a period of decades, many institutions (state and municipal governments, universities, and private businesses, among others) began to favor various minorities even though there was no specific evidence of prior discrimination. Blacks, in particular, were favored in obtaining state, municipal, and private jobs, as well as in admission to colleges and universities, and in the awarding of state contracts, over more highly qualified individuals and groups whose only sin was being white.

Call this "quotas," or "affirmative action," or "reverse discrimination," the net result is that less qualified people are often favored over others simply because of the color of their skin — exactly the outcome that Hubert Humphrey swore was impossible.

That is why an initiative is making its way toward the California ballot in 1996 whose operative paragraph reads: "Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting."

Polls indicate that such an initiative is likely to be overwhelmingly popular with voters of both major parties and even of varying skin colors. The California Republican Party endorsed the initiative unanimously at its last convention. Recently Gov. Pete Wilson spoke approvingly of the general principle. Even at the national level, Republican leaders are beginning to recognize that this is an issue whose time may well have come.

Privately, on the other hand, Democratic political leaders are terrified — and with good reason. For if this initiative appears on the California ballot in 1996, it will split the Democratic Party from crotch to chin. The party's professional black spokesmen will fight the proposal with their last ounce of breath, while white blue-collar workers (many of whom have already felt the lash of "reverse discrimination") will recognize it as their salvation.

Theoretically, the initiative could appear either on California's primary ballot, in the spring of 1996, or on the general election ballot in November 1996. Need I tell you which the Democrats dread more? If this popular counterattack on a major weapon of the liberal "minorities' coalition" is on the ballot for the November election, it will energize the state's conservative voting blocs precisely as Proposition 187 (cutting welfare benefits for illegal aliens) did last year.

And California is the 800-pound gorilla of presidential politics, without which the Democrats don't have a prayer of winning the White House in 1996.

The charms of "affirmative action" are fading fast, and it is conceivable that the new Republican-controlled Congress will pass a federal statutory equivalent of the above-quoted initiative even before November 1996 rolls around. In that case, President Clinton will have the ghastly problem of deciding whether to sign it.

William A. Rusher, a distinguished fellow of the Claremont Institute, is a nationally syndicated columnist.

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Affirmative action boosts provided in a bipartisan way by the Johnson and Richard M. Nixon administrations helped the new black middle class to appear more rapidly in public jobs than in private jobs. Yet it is the public jobs that the California initiative would affect.

Private corporations, in my experience, are seeking quite the opposite. Recognizing how America's work force is rapidly diversifying, business leaders are looking for ways not to avoid quotas but rather to recruit, hire, retain and promote more women and minorities in workplaces previously closed to them.

So, yes, I welcome a nationwide debate on affirmative action. One fears a debate only when one fears losing. I fear only that we will discard remedies for racism and sexism while the maladies continue to thrive.

Clarence Page is a nationally syndicated columnist.

The Washington Times

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PAGE: A17

Affirmative action on a precarious

Tremors in California

CLARENCE PAGE

What next out of California? The birthplace of the anti-tax movement in the '70s, the anti-smoking movement in the '80s and the anti-immigrant movement in the '90s, California may be well on its way to bringing us an anti-affirmative action movement.

Since white males, the group whose supremacy affirmative action is designed to counterbalance, were the most significant "swing" voters in November's conservative sweep, the time may be ripe for affirmative action, which always is under attack, to come under increased fire.

Even so, House Speaker Newt Gingrich and other congressional Republicans are reluctant to move on it too soon, for fear of sending unwholesome signals to women and minorities. But a popular groundswell out of the nation's biggest state will be felt nationwide, perhaps even in the halls of the Rehnquist Supreme Court, which has taken on several significant cases this session.

As an African-American male who supports affirmative action goals, although not hard quotas, I welcome the debate. Affirmative action was never intended to be permanent. A policy this controversial, striking at the nation's oldest pain, the perennial problems of race and sex, cries out desperately for periodic review.

Thirty years have passed (My, how time flies.) since President Lyndon B. Johnson signed the first affirmative action executive order. That's a generation and a half. We have learned a lot since then, but unfortunately not enough to say that affirmative action is no longer needed.

Much has been written about affirmative action, for and against, but a couple of observations consistently come through to me. One of them is that affirmative action is a messy system of rough justice. However, no one has come up with a better way to remedy the injustices of the past or to ensure proper enforcement of civil rights laws in the future.

The other is that to equate affirmative action with "reverse discrimination" is to rewrite history.

American presidents argued relentlessly, and correctly, against the misguided United Nations resolution that equated Zionism with racism, noting, as George Bush did, that to do so "is to twist history and forget the terrible plight of Jews in World War II and indeed throughout history."

Similarly, as Duke University's Stanley Fish has pointed out, it is only by detaching the experiences of victimized groups from their historical conditions that one can find their actions to be morally the same as their historical oppressors'.

As Johnson said three decades ago, the long history of oppression and humiliation leaves some groups of people significantly less able to compete. To simply say, "OK, from now on you're equal" would simply freeze inequities in place. "You don't starve somebody for a month, break both legs, put him at the starting line and say, 'May the best man win,' " he said.

The proposed "California Civil Rights Initiative," which probably won't be on the ballot until 1996, would bar the state or any state agencies or contractors from using race, sex, color, ethnicity or national origin "as a criterion for discrimination against or preferential treatment" for public employment, education or contracts.

Nice and neat as that sounds, it begs the issue's most nagging questions. Even so, the proposal's backers favor continued use of racial and gender statistics to "keep track" of hiring and contracting, according to Glenn Custred, a California State University anthropology professor and co-author of the initiative.

But, if racial and gender record keeping is OK, can those statistics be put to use in court cases? How about the number of women and minorities in the labor pool of the community at large? If a company's hiring numbers fall significantly below the number of qualified women and minorities in the labor pool, is that grounds for a lawsuit? If so, is that not a "quota?"

Questions like these explain why even some of affirmative action's best-known critics support at least some aspects of it. William Bradford Reynolds, President Reagan's civil rights czar and an ardent foe of "quotas," nevertheless defended the need to have aggressive "recruiting." Is race or gender to be a "plus" or not?

Supreme Court Justice Clarence Thomas has always defended aggressive anti-discrimination enforcement for individuals, but not groups. Yet individual enforcement often requires remedies for groups, as in the case of federal court decisions that have ordered hiring and promotion quotas for police and fire departments.

Other opponents make the elitist argument that affirmative action helps those most who need help the least. Yet the Reagan administration's own studies found affirmative action had mostly helped skilled blue-collar workers who were unable to get into exclusionary unions or public jobs like police and fire departments.

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Evoking King, Clinton Defends National Service

White House Draws Line Against Hill Republicans

By Ann Devroy
Washington Post Staff Writer

A1

DENVER, Jan. 16—President Clinton, chiding Republicans for their opposition to his national service program, today evoked the memory of the Rev. Martin Luther King Jr. in summoning Americans to repay their country for their freedoms by providing responsible service to their communities.

Without directly attacking House Speaker Newt Gingrich (R-Ga.), who opposes the national service program under which students do community work in exchange for college stipends, Clinton made clear that he will use the issue to draw a line between his policies and those of the GOP. White House aides have suggested that Clinton would veto any effort by Republicans to kill the program.

"I was told . . . in this new Congress there may be a move to abolish the national service corps to save money to pay for tax cuts," the president told a rally in Civic Center Park here. Asserting his own belief in a leaner government and middle-class tax cuts, Clinton said, nonetheless, that the "purpose" of the effort to reduce the government "is not to wreck the government, not to give us a mean-spirited government. It is to give us a lean government that will help us to work together to solve our own problems."

The White House seized on some recent comments by Gingrich opposing national service to reinforce Clinton's gentle criticism. The president's statement was part of an effort to point out subjects where he has fundamental philosophical disagreements with the Republican-controlled Congress. That contrasts with the administration's public approach at the opening of Congress, when the White House was at pains to emphasize subjects on which it agreed with the Republicans.

Gingrich has opposed the national service program since its introduction by Clinton in

See CLINTON, A4, Col. 1

■ *Civil rights panel urges leadership from the president and Congress. Page A7*

ASSOCIATED PRESS

President Clinton and Sen. Ben Nighthorse Campbell (D-Colo.) disembark from Air Force One in Denver.

Clinton Defends National Service At King Day Rally

CLINTON, From A1

1993; he and many Republicans voted against it. He repeated that opposition in an interview with Newsweek published today in which he said, "I am totally, unequivocally opposed to national service. . . . It is coerced volunteerism. It's a gimmick."

Eli Segal—head of the national service program, Americorps—called reporters to the White House to outline the hundreds of community service programs that workers are involved in around the nation and to have workers give testimonials to benefits they and their communities received from the program.

Segal asserted that the program is precisely what the voters want—a nonbureaucratic effort that "enables young people to give a hand to their communities, get a hand paying for college and show all of us what's best in America."

He invited Gingrich, publicly and in a letter released by the White House, to join him in visiting Americorps programs. "Americorps programs renew America just the way he's talked about," Segal said of Gingrich, "with citizens solving problems from the grass roots up."

Al From, president of the Democratic Leadership Council, the conservative wing of the party, also entered the fray. In a statement, From quoted Gingrich's calls for revitalizing citizenship and civil society, and said, "To abolish national service would be inconsistent with those important goals." He called Gingrich's words "a sad retreat" from ideals he espouses.

A senior official traveling with Clinton said the president was "surprised" at Gingrich's opposition. The program, he said, "is what Americans are for. They're asking for streamlining government but to make that work, you've got to be able to provide incentives for volunteerism and that's what national service is all about. It's an effective way to get kids involved in serving this country. . . . It is a little bit difficult to understand tax credits as incentives, tax cuts as incentive but not support national service."

Gingrich's spokesman, Tony Blankley, said of Gingrich's opposition to national service: "This is what he has said all along. Most Republicans oppose it. It is a program that spends a lot of money for few benefits. This is an employment program, not national service where work is voluntary."

Under the program, participants work at least 1,700 hours a year on projects involving public safety, health, education or the environment. In exchange, they receive $4,725 per year for college. Clinton had wanted a program open to all college students who wish to participate but was forced to scale back in the face of federal budget problems. Congress originally funded 20,000 Americorps positions at 350 projects nationwide.

Clinton made his remarks at a huge rally commemorating the Martin Luther King holiday in which he stressed citizen responsibility and called the national service program representative of "everything I want to do" because the program creates a "new relationship" between the government and citizens, offering help in return for work.

Clinton said the nation must "build a new community" to survive and without naming Republicans directly said those who, like King, fought for civil rights in this country did not do so to "advance the proposition we are all just isolated individuals out there and everything we do as a government is wrong."

Court to Hear Minority Business Case

Court to Hear Pivotal Case on Racial Policy

By Joan Biskupic
Washington Post Staff Writer

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DENVER—Randy Pech said he was tired of losing highway construction projects to companies owned by Hispanics or blacks even when his company had submitted the lowest bid.

"In the early 1980s when I first heard 'You were low, but we had to give it to a minority company,' I flipped," said Pech, 40, who is white. Pech manages a guardrail construction firm and is at the center of a pivotal Supreme Court case on government policies that encourage race-based preferences.

The dispute, to be heard today, comes to the high court at a time of increased public and judicial apprehension about race-conscious decisions—in contracting and procurement, scholarships and other social policies. Affirmative action blossomed in the 1960s and 1970s as federal lawmakers tried to compensate for the remnants of segregation, prejudice in the "old boys' network," and other attitudes that were thought to make it hard for minority-owned businesses to prosper.

Now, conflict over such programs is building nationwide. Politicians, responding to what they perceive to be the message from the most recent elections and opinion polls, are rethinking measures that were designed to remedy America's history of rac-

See COURT, A4, Col. 4

COURT, From A1

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SUPREME COURT CALENDAR

The Supreme Court will hear oral argument today from 10 a.m. to 2 p.m. in the following cases:

No. 93-1841. *Adarand Constructors v. Peña.* Whether a federal policy giving money bonuses to firms that subcontract with minority-owned companies violates the Constitution's guarantee of equal protection of the laws. (One hour.)

No. 93-1935. *Curtiss-Wright Corp. v. Schoonejongen.* Whether federal law requires employee benefits plans to specify who in an organization can amend the plan and to provide details of such process. (One hour.)

No. 94-197. *Anderson v. Green.* Whether a state may deny new residents the full welfare benefits afforded longer-term residents. (One hour.)

Some federal courts recently have given greater scrutiny to such programs. Last October, an appeals court rejected a University of Maryland scholarship program exclusively for blacks.

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Days said that while the government presumes that certain minorities (specifically blacks, Hispanics, Native Americans and Asians) are disadvantaged in this country, that presumption can be overturned if proof emerges that the company has no social or economic disadvantage.

"[C]ongress recognized . . . that not all minority group members have equally borne the brunt of racial discrimination," Days told the justices in his brief.

But Pech counters, "It's not up to me to challenge a 'disadvantaged' status." His lawyer, William Perry Pendley, added, "He is in the postion of building guardrails. He is not in the position of gathering data and engaging in litigation."

Pendley, of the Mountain States Legal Foundation, is urging the court to review the federal program with the same strict scrutiny the justices have said state and local affirmative action policies deserve.

Days argues that the economic position of minorities, relative to whites, has worsened through the decades and unemployment continues to affect blacks and Hispanics at a greater rate than whites.

THE WASHINGTON POST TUESDAY, JANUARY 17, 1995

SUPREME COURT

Ruling Rocks Foundation Of Affirmative Action

Federal programs now must pass 'strict scrutiny' test even as challenges to policy build in Congress

Republican lawmakers are pushing ahead with efforts to unravel affirmative action, encouraged and empowered by a dramatic Supreme Court ruling that cast doubt on federal programs seeking to advance women and minorities.

The high court June 12 handed down a 5-4 opinion in a closely watched case, *Adarand Constructors v. Pena*, that challenged a federal affirmative action program.

O'Connor, left, said the Constitution guarantees equal protection to individuals, not groups. Stevens led the dissent.

The majority opinion, written by Justice Sandra Day O'Connor, did not actually strike down any affirmative action programs — not even the special considerations for minority subcontractors that were at issue in the case. But it criticized the moral justification for affirmative action, saying that race-conscious programs can amount to unconstitutional reverse discrimination and even harm those they seek to advance. The ruling puts these programs on far more tenuous legal footing. From now on, federal affirmative action programs will be subject to the most rigorous level of court review — a test that has proved difficult to pass.

At a minimum, the ruling seems certain to invite legal challenges to other federal affirmative action programs.

But Congress, or even President Clinton, might get there first.

Republicans had been preparing a legislative assault on federal affirmative action, either by eliminating programs or with a sweeping measure to outlaw virtually all federal preferences on the basis of race or gender. Their targets include scores of congressional and executive branch initiatives that offer special consideration or set-asides for women, minorities and others in federal contracting and hiring. *(Weekly Report, p. 1578)*

By Holly Idelson

The *Adarand* decision should embolden this camp, adding political and intellectual heft to its position.

"The Supreme Court's decision today is one more reason for the federal government to get out of the race-preference business," Senate Majority Leader Bob Dole, R-Kan., said in a prepared statement. "It's now our responsibility in Congress to follow the court's lead and put the federal government's own house in order."

Dole traditionally supported affirmative action, but in recent months has criticized the policy and pledged to curtail or eliminate federal preferences.

Some advocates of affirmative action conceded that their task would be more difficult in the months ahead.

Yet many hastened to underscore that the debate is far from over.

All but two justices indicated that affirmative action is sometimes appropriate to address ongoing problems of discrimination.

By fencing out race-conscious programs that cannot meet the new rules, many supporters said, the court simultaneously has drawn a protective line around a permissible zone for affirmative action. Rep. Melvin Watt, D-N.C., said he hopes the ruling will undercut Republicans who want to abolish affirmative action. "The Supreme Court has boxed some of my colleagues in," he said.

Clinton, whose administration is reviewing affirmative action efforts, June 13 released a statement stressing this view. "The court has approved affirmative action that is narrowly tailored to achieve a compelling interest," Clinton said. "The constitutional test is now tougher than it was, but I am confident that the test can be met in many cases."

Rather than ending the debate on affirmative action, the court ruling may have sharpened it.

"I think there are people on the Hill who will wrap themselves in the court decision," said William L. Taylor, vice chairman of the Leadership Conference on Civil Rights. But because the court indicated there is room for some affirmative action, Taylor said, lawmakers cannot pretend that the *Adarand* decision settles the issue.

"Their choices are their choices and not the court's," he said. If they abandon affirmative action, Taylor said, "they will be responsible for the consequences of what they do."

Shifting Standard

The *Adarand* case concerned a Department of Transportation policy that gave contractors a bonus if they hired minority subcontractors.

Under the program, the bonus applied to any "disadvantaged business enterprise." Racial minorities were presumed to meet the "disadvantaged" criterion, subject to a challenge proving otherwise. Non-minorities could become eligible for the program if they

could show how they were socially and economically disadvantaged.

A white contractor challenged the policy in court after losing a contract to build guardrails, despite offering the lowest bid.

A federal appeals court upheld the program as within the proper bounds of affirmative action. The Supreme Court decision did not uphold or reject that ruling, but instead sent the case back for further review under new, tougher rules.

At the core of the court's decision are the words "strict scrutiny" — a legal term that means the policy in question is on dubious constitutional ground and must be extremely well justified to survive a court challenge.

Since 1989, the Supreme Court has required that state and local affirmative action programs pass the strict scrutiny test.

To survive strict scrutiny, a policy must serve a "compelling" governmental interest and employ the most narrowly tailored means to that end.

The federal government, however, has operated under a somewhat looser standard that gives it more leeway in implementing affirmative action. This intermediate standard requires that a policy serve important goals and be "substantially related" to those ends.

As recently as 1990, the high court upheld a program to grant minority broadcasters a preference in obtaining federal licenses. There, the majority said that when the federal government makes racial distinctions for a benign or remedial purpose, such programs need only survive intermediate-level scrutiny by the federal courts. *(1990 Almanac, p. 379)*

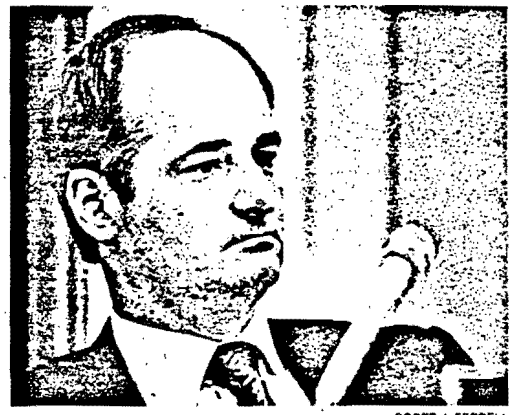
Now the court is taking a new tack.

O'Connor said the federal government must meet the same standards as state and local governments when it takes race into account, even if its programs are meant to advance rather than harm the affected group.

She wrote that the Fifth and 14th amendments to the Constitution guarantee equal protection to individuals rather than to groups. "It follows from that principle that all governmental action based on race — a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited' . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."

(Excerpts from the opinion, p. 1744)

O'Connor did not specify whether the Transportation Department program would meet the new test. Nor did her opinion rule out the potential for some constitutionally valid affirmative action programs. "The unhappy persistence of both the practice and the lingering effects of racial discrimination . . . is an unfortunate reality," she wrote, "and government is not disqualified from acting in response to it."



SCOTT J. FERRELL

Canady plans to introduce a bill outlawing most federal affirmative action programs.

Two justices, Clarence Thomas and Antonin Scalia, would have gone further and outlawed any use of racial preferences. "Government can never have a compelling interest in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction," Scalia wrote.

The four dissenting justices said the main opinion went too far.

Justice John Paul Stevens wrote a lengthy dissent, taking issue with almost every step in the majority's reasoning. "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."

Stevens said Congress should have more leeway than state or local governments. He noted that the 14th Amendment, while prohibiting the states from discriminating against racial minorities, explicitly empowers Congress to take action necessary to make equal protection a reality.

Justices Stephen G. Breyer, Ruth Bader Ginsburg and David H. Souter also dissented.

Stevens pointed out that the ruling may wind up sustaining affirmative action for women while outlawing it, in most cases, for racial minorities. Gender distinctions traditionally have been scrutinized in the court under intermediate rather than strict scrutiny.

The Next Chapter

The court decision likely will delay a long-awaited administration review of federal affirmative action programs.

Clinton ordered the review in February, saying he wanted to see if some programs needed to be strengthened or discarded.

Administration officials are expected to re-evaluate the programs in light of the new legal rules.

There is considerable debate about how many of the programs can withstand that test. Some analysts, such as conservative activist Clint Bolick, predicted that few programs would pass muster. However, Judith Lichtman, president of the Women's Legal Defense Fund, said dozens of state and local affirmative action programs have been upheld under the "strict scrutiny" standard.

Generally, that standard has meant the government must show that an affirmative action policy responds to specific past discrimination, rather than general societal prejudices, and that the problem cannot be overcome through race-neutral measures.

Watt said he hopes lawmakers will let the administration conduct the review and adjust the programs — many of which are executive branch directives — itself.

GOP leaders do not have the issue on a fast-track summer agenda, and House Speaker Newt Gingrich, R-Ga., said he might prefer to proceed slowly.

Still, some Republicans appear prepared to take an active role, and soon.

Besides Dole's renewed pledge to go after affirmative action programs, another GOP presidential candidate, Sen. Phil Gramm of Texas, has said he would try to block affirmative action via the must-pass appropriations bills.

In the House, Rep. Charles T. Canady, R-Fla., is moving ahead with plans to introduce and mark up a major bill outlawing virtually all federal affirmative action programs. Canady chairs the House Judiciary Subcommittee on the Constitution.

Meanwhile, Small Business Committee Chairman Jan Meyers, R-Kan., said she has been preparing to excise the Small Business Administration's well-established set-aside program for minority subcontractors from an upcoming reauthorization bill. ■

Excerpts From Court Decision

Following are excerpts from the Supreme Court decision June 12 in Adarand Constructors v. Pena. *In the 5-4 decision, the court said federal affirmative action programs must meet a standard known as strict scrutiny, which requires them to be "narrowly tailored" to meet "a compelling government interest."* (Story, p. 1743)

The majority opinion was written by Justice Sandra Day O'Connor and joined by Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas. O'Connor wrote:

... All governmental action based on race — a group classification long recognized as in most circumstances irrelevant and therefore prohibited — should be subjected to detailed judicial inquiry to insure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and Federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality" should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever Federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests....

By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide(s) a relevant basis for disparate treatment" is legitimate, before permitting unequal treatment based on race to proceed....

We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means....

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practical and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it....

When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Concurring, Thomas wrote:

I believe that there is a "moral (and) constitutional equivalence" between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the Government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution....

Dissenting Views

Dissenting from the ruling were Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Stevens wrote:

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat.... It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad....

It is one thing to question the wisdom of affirmative action programs; there are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to enact or retain race-based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents, whether members of majority or minority races, who have supported affirmative action over the years to segregationists and bigots....

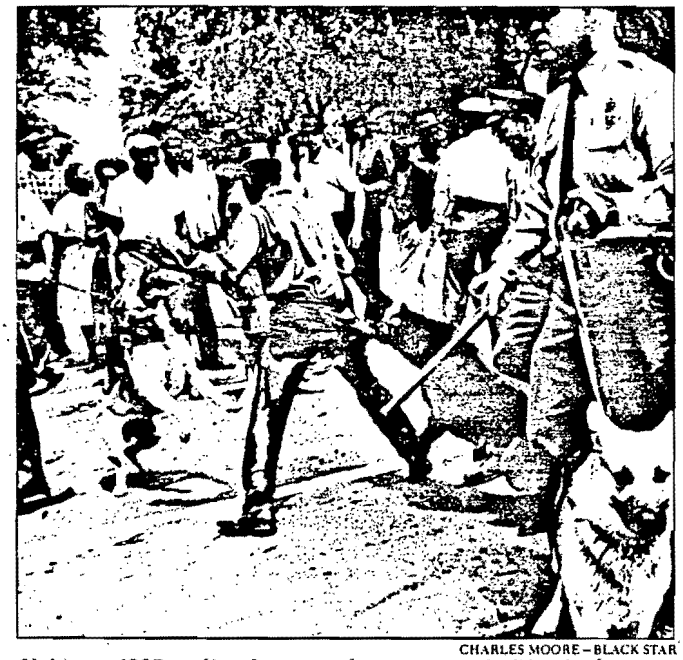
In a separate dissent, Ginsburg wrote:

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress's authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our work places, markets and neighborhoods. Job applicants with identical resumes, qualifications and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals....

Rethinking the Dream

Race: Thirty years after the heyday of civil rights, it's becoming respectable—even in the once liberal establishment—to roll back affirmative action

FEW WHITE MEN HAVE better civil-rights credentials. The old newspapermen who had gathered for an informal reunion at the Atlanta airport Holiday Inn on a recent Saturday night had been thrown in jail and chased out of dusty delta towns during the Movement Days of the 1950s and '60s. During a night of strong drink and reminiscence, the old hands from publications like The New York Times and The Washington Post quietly recalled the clarity of the clash between peaceable black demonstrators and the Bull Connors of the then segregated South. "Hell, everything was clearer then," said Claude Sitton, who covered the region for the Times from 1958 to 1964. "Going to the back of the bus, drinking out of separate water fountains, going to segregated schools—those are the kinds of things that just hit you right between the eyes." But in the morning, the aging veterans puzzled over the current state of the civil-rights struggle—the tedious court battles over formulas and standards. "When it gets down to all of the subtleties and complexities of legal tests, well, that's much harder for the public to understand," said John Popham, a dapper octogenarian who covered the first stirrings of the movement for the Times back in the late 1940s. No one came out and said it, but there was a sense that the revolution they courageously covered may be losing its indisputable moral force.



CHARLES MOORE—BLACK STAR

Alabama, 1963: *Police dogs attack a protester in Birmingham*

Conservative politicians have been criticizing affirmative action for years. What's different today is that the once liberal establishment has begun, grudgingly and slowly, to have its own second thoughts. The judges and unelected executive-branch officials who have largely made affirmative-action policy for the past 25 years—and the editorial writers who have supported them—are beginning to back off. They eschew the rhetoric of Republican presidential candidates who want to make affirmative action a "wedge issue." The establishment would like to find a comfortable compromise. That's difficult, as President Clinton is discovering. Promised months ago, the administration's review of government affirmative action is still a work in progress, with no end in sight. But over time, the likely effect of such second-guessing will be to largely remove the government from handing out jobs or contracts or school admissions based on race.

Last week the U.S. Supreme Court seemed to scale back the federal government's own affirmative action. By a 5-to-4 vote, the justices fashioned a legal test that will make it very difficult, if not impossible, to preserve government programs that give an edge to minorities and women. The decision in *Adarand Constructors v. Pena* was written in the usual murky legalese. But the point was articulated by the plaintiff, Randy Pech, whose Adarand construction outfit in Colorado had lost out to a Hispanic-owned company under a program that earmarked highway contracts for minorities. The burly Pech asked why he should be discriminated against to make up for discrimination that occurred more than a century ago.

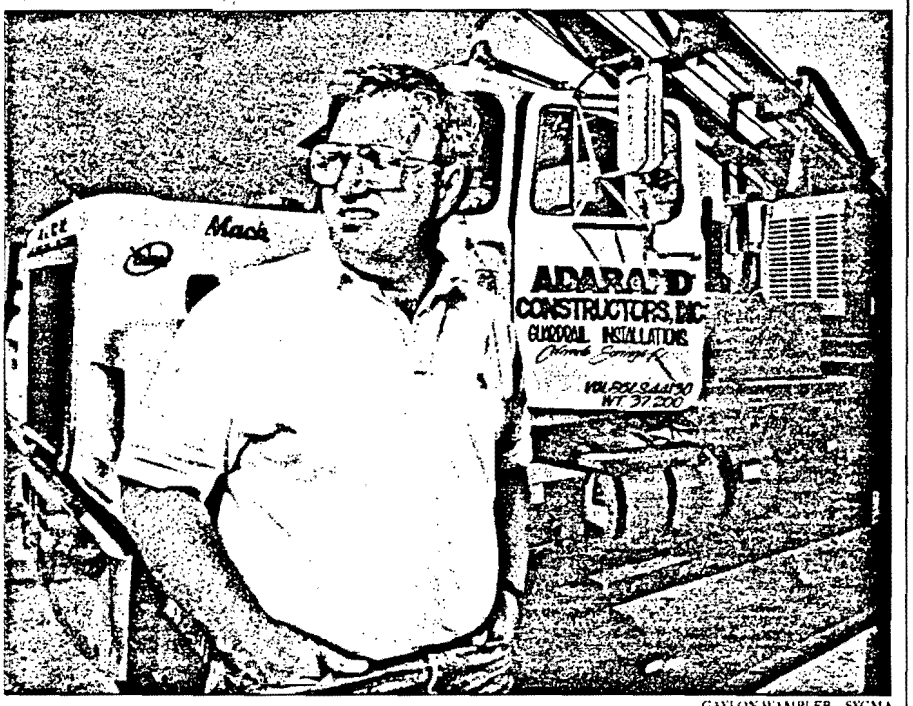
Reaction to the decision was muted. Of course, civil-rights leaders are angry; Jesse Jackson called it a "major setback." But except for The New York Times, there was little protest on op-ed pages. A White House spokesman blandly noted that the administration was "asking many of the questions the court focused on."

The decision signals that the high court is following the election returns. For more than a decade, since it ruled that race could be a "factor" in university admissions in the 1978 Bakke case involving the University of California (box), the court had basically rebuffed challenges to affirmative action. In recent years, however, the court has shown a growing reluctance to use "race-conscious remedies"—the practice of trying to overcome the effects of past discrimination by helping minorities and women. This has been true not only in affirmative-action cases involving jobs and contracts, but in school desegregation and

voting rights as well. On the same day the court handed down the Adarand decision, it also cast strong doubt, in a Kansas City, Mo., case, on whether federal courts can promote integration by requiring the state to fund inner-city "magnet schools." In the coming weeks, the court is expected to curtail the drawing of racially "gerrymandered" congressional districts designed to elect minority lawmakers.

The animating notion of affirmative action has always been that it is necessary to use race to overcome the effects of racism. In some ways, the policy has worked. Affirmative action's cultural impact is unlikely to be reversed entirely—the search for minorities for jobs is now ingrained, at least informally, in many institutions. On a pocketbook level, a 1995 study by Rutgers professor Alfred Blumrosen found that 5 million minority workers and 6 million women have better jobs today than they would have had without preferences and anti-discrimination laws. Certainly, minority contractors who stand to lose from the court's Adarand decision are understandably anxious. "The reality is that 90 percent of the work that we do is in the public sector," said Nigel Parkinson, president of a Maryland construction company. The decision, he said, will "just kill us."

'Beyond racism': At the same time, affirmative action has engendered tremendous resentment among whites, few of whom have lost jobs to minorities, but many of whom think they have. The policy that was supposed to get "beyond racism" risks creating more racists. Court-ordered busing did not produce integration; whites fled the inner cities, leaving schools more segregated than ever. The Kansas City program challenged in the Supreme Court spent $1.3 billion to lure suburban whites to urban magnet schools. But after a decade, the city schools were still two-thirds black.



GAYLON WAMPLER—SYGMA

White backlash: *Randy Pech lost a contract to a Hispanic-owned company, took his case to the Supreme Court—and won*

The rule of unintended consequences is particularly ironic in the voting-rights area. The Voting Rights Act of 1965 guaranteed minorities the right to vote—but did little to increase the number of minority representatives in Congress. The Justice Department responded by encouraging states to draw some majority-minority districts. By 1993, this led to historic gains for the black and Hispanic caucuses. But the weird, serpentine-shaped districts siphoned off liberal voters from other districts—producing

California Forecast: Storms on Campus

THEY CAME FROM ALL OVER California, some skipping exams to beg the mostly Republican, white male University of California Board of Regents not to abolish affirmative action. "If you get rid of it, you're closing the door on my community," said Lilia Garcia, an honor student from East L.A. who drove all night to the San Francisco meeting, cramming by flashlight for a final on the Pinochet regime. Law student Robin Haaland urged the regents "not to jump on the bandwagon of political opportunism—you're not *all* running for president."

The sprawling, 162,000-student U.C. system was one of the first public universities to embrace affirmative action in the 1960s; its Davis medical school sparked the U.S. Supreme Court's historic Bakke decision in 1978. Next month, the board is set to vote on an incendiary proposal by regent Ward Connerly (himself an African-American) to end race and gender preferences in admissions and hiring. Connerly, a Sacramento businessman and Gov. Pete Wilson ally, argues that affirmative action stigmatizes minorities it's intended to help: "We cannot allow the desire for diversity to overshadow the need for the best-qualified students."

But who is "best qualified"? There are no simple criteria. Last year Berkeley, the most prestigious of the state's nine campuses, got more than 9,000 applications from straight-A students and had space for only 3,500 freshmen. So other factors—including geography and income—are also considered. U.C. officials acknowledge that it's easier for qualified minority applicants to get these coveted spots than it is for qualified whites (the mean grade-point average for entering freshmen last year was 3.4 for blacks; 3.7 for Hispanics; 3.8 for whites; and 3.9 for Asians). A small percentage of lower-scoring students are also admitted based on special athletic or musical talent. Connerly doesn't object to those preferences, but he does oppose cases in which less-qualified minorities are allowed in just because of their race. Yet no one can say exactly how many students are admitted because of racial affirmative action alone.

Scale back: Clearly, passions are running ahead of percentages in the U.C. debate. More rallies are planned before next month's meeting—and student regent Ed Gomez says he'll try to postpone the vote. If California voters approve the 1996 initiative banning preferential treatment by race, sex or ethnicity, U.C. will have to scale back its affirmative-action policies anyway. Campus liberals are prepping for the fight. "Change anything," one protester audaciously warned the regents last week, "and you'll have a new civil-rights movement on your hands."

conservative congressmen likely to be unsympathetic to minorities.

Impatient with the important but inevitably slow progress of the courts, GOP leaders vow to pass a law that would eliminate all "racial preferences" from federal hiring and contracting. Given the public mood, it's not surprising that Senate Majority Leader Bob Dole and his presidential rival Sen. Phil Gramm are attacking racial preferences. More telling of the shift in the establishment center was the recent scene in the Senate Labor Committee, where Nancy Kassebaum of Kansas, a moderate, held hearings to warn that affirmative-action requirements on business can become "harmful and unfair."

Diverse world: The private sector's response to all this? Most Fortune 500 companies say they are committed to affirmative action. Creating a diverse work force, they say, is good business in an increasingly diverse world. But most of these companies now work under federal rules that make sure they follow through. And many companies also have federal contracts that require them to hire minorities and women in rough proportion to the local population. Even if the Feds go all the way and eliminate their requirements, some sort of affirmative action, however informal, is likely to remain. But without the standards that grew out of the '60s, affirmative action's future is a bit hazier—and diversity will depend not on clear federal action but on corporations, and people, doing the right thing.

EVAN THOMAS *and* BOB COHN *with* VERN E. SMITH *in Atlanta*

LOU DEMATTEIS—JB PICTURES

Back to the barricades: *Student regent Gomez protests at U.C. San Francisco*

STEPHEN JAFFE—JB PICTURES

'I was helped by affirmative action': *Powell hints that he may favor some racial preferences*

What Does Powell Think?

Politics: A dilemma for America's No. 1 black leader

BY HOWARD FINEMAN

COLIN POWELL LIVES A LIFE THAT seems beyond the gravitational pull of race. He owns a sprawling home in a white Washington suburb, loves tinkering with old Volvos and enjoys the image of a leader whose skills have nothing to do with skin color. All of which makes him a crucial—and as yet unsummoned—witness in the ongoing trial of affirmative action.

Powell hasn't spoken out often on racial issues, or on much else outside the military chain of command. But as he edges toward a civilian role—and a national tour to promote his autobiography—he's dropping hints. It turns out that if Powell is a Republican, he is a rare one: a supporter of affirmative action. He accepts its predicate that racism still corrodes America. And unlike possible GOP presidential rivals, from Bob Dole to Pete Wilson, Powell believes government has a role, however limited, in giving minorities special consideration.

Powell's preachments tend to be colorblind paeans to hard work, discipline and family. But in a speech at Salem State College in Massachusetts this spring, he was asked if racism had hurt his career. Just the opposite, he said. "I never felt hurt by it," the student newspaper, The Log, quoted him as saying. "And I must admit that I was helped by affirmative action in the service."

That isn't surprising. Since Harry Truman's order to integrate the services in 1948, the army has been considered the branch most hospitable to blacks. The army's definition of affirmative action, says longtime Powell aide Bill Smullen, is to provide "extraordinary opportunities for advancement" to qualified minorities, making race one of many factors in promotion.

That's what happened in Powell's case, according to Clifford Alexander, an African-American lawyer who was Jimmy Carter's secretary of the army. When Alexander arrived at the Pentagon in 1977, he insisted on widening the search for blacks eligible for elevation to general. Powell was among those added to the list, Alexander has said. Powell got his star in 1979.

Lunch counter: In his book, Powell will deal with racial issues in his own life. In the '60s, his family was stationed in segregated Alabama. "I can remember very well being denied access to a lunch counter," he said at Salem State. "This isn't ancient . . . Let's recognize that there are still racial problems in our country."

Although Powell benefited from affirmative action, his public views on it are carefully calibrated to avoid giving offense. He opposes quotas and "reverse discrimination." At Salem State he suggested that help be provided only to those minorities too poor or powerless to get ahead otherwise. "I don't believe," he said, "that anyone with money or connections should be helped by affirmative action."

If he seeks the presidency, Powell would be the first broadly popular black candidate for national office. Would he make racial justice an overt theme? Friends doubt it. "Colin is a very practical guy," says Robert L. Johnson, president of Black Entertainment Television. "He wouldn't run on affirmative action, and wouldn't have to. The symbolism of his presence would be enough." But if he does run, Powell will have to address the issue in detail—and America will be listening carefully. ■

AFFIRMATIVE ACTION

'A THUNDEROUS IMPACT' ON EQUAL OPPORTUNITY

A Supreme Court decision may gut racial preferences

Six years ago, affirmative action began a giant slide down a treacherous slope. That was when the U.S. Supreme Court, setting a tough legal standard for state and local minority set-aside plans, tossed out a Richmond (Va.) program that reserved 30% of the city's construction work for minorities.

The decision had a rapid impact: Within a year, nearly all of the nation's 236 state and local programs had been dismantled or suspended, according to the Minority Business Enterprise Legal Defense & Education Fund. In Richmond, the minority share of construction dollars shriveled from 41.6% to 2.2%. "It was devastating," says Deborah L. Barnes, Richmond's minority business enterprise administrator. "Diversity in the construction industry went back to its old ways."

Now, affirmative action may be nearing the cliff. On June 12, the Supreme Court raised the same hurdle for a federal program that helps companies classified as "disadvantaged." The ruling could affect a panoply of racial preferences, from reserving radio spectrum for minorities to the 1965 executive order requiring nearly 200,000 federal contractors to adopt affirmative-action hiring plans. The decision "will have thunderous impact," warns Ronald M. Green, a lawyer who represents companies in affirmative-action disputes.

PRESSURE. Some lawmakers aren't waiting for the ripple effect. Senate Majority Leader Bob Dole (R-Kan.) and Representative Charles T. Canady (R-Fla.), chairman of a key judiciary subcommittee, plan to introduce bills to nullify the executive order and other federal programs that help minorities. Even President Clinton is likely to recommend curtailing some preferences.

Some experts say the shift in Washington could prompt companies to return to their old habits. "If we pulled the affirmative-action programs tomorrow, we would revert back to blatant discrimination in a second," says Donna Gillotte, a consultant who has studied companies' attitudes toward diversity.

Employers such as Sears Roebuck, AT&T, and Texas Instruments dismiss such fears. If a company depends on employees for a competitive advantage, "you've got to create an environment to attract people from all segments of the population," proclaims Jim Porter, Honeywell Inc.'s vice-president for human resources.

Lawyers advising corporations raise another concern. Government contractors face a conflict between the ruling and the 1965 executive order. If they scrap their affirmative-action plans, they may lose federal contracts. Under the new ruling, though, too aggressive a plan may spawn reverse-discrimination suits. "It really puts business in a bind," says Theodore Wang, an attorney with the Lawyers' Committee for Civil Rights, a San Francisco nonprofit group that consults with large employers.

A slew of litigation is expected to resolve the uncertainty created by the Supreme Court ruling. The case was brought by Randy M. Pech, the white owner of Adarand Constructors Inc., a Colorado Springs company. After submitting the low bid for subcontracting work, he lost to a company designated as disadvantaged because of its Hispanic ownership. The high court didn't strike down the preference program but said that, like state and local set-asides, it was subject to "strict scrutiny." The plan could be upheld if the government proves it had a compelling interest, such as correcting past discrimination, and that the remedy was narrowly tailored.

DIRTY WORK. Some cities and states have met that difficult standard by introducing race-neutral programs targeting the disadvantaged or flexible goals for minority contracting. But studies that prove past discrimination are expensive. For Uncle Sam to justify all of its programs would require an unprecedented number of studies and discrimination findings. "I can't imagine how they're going to do it," says Gilbert J. Ginsburg, a Washington contracts lawyer.

Advocates of affirmative action are eager to try. But Ralph C. Thomas III, head of small-business contracts at the National Aeronautics & Space Administration, worries that the effort could strain relations with government contractors. To justify programs, "we have to dig up all the dirt" on companies' hiring practices, he says. If the ruling also emboldens more workers to file reverse-discrimination suits, the last phase of the affirmative-action war could be a nasty one. And Corporate America could get caught smack in the middle.

By Stan Crock in Washington, with Michele Galen in New York and bureau reports

ED ANDRIESKI/AP/WIDE WORLD

Now, the feds must prove past discrimination to justify preference–and that's expensive

CONTRACTOR PECH'S SUIT LED TO THE RULING

LEGAL LIMBO FOR EMPLOYERS

How the Supreme Court's ruling on federal preference programs may affect corporate affirmative action:

PROBABLY SAFE

- Voluntary hiring and promotion goals for minorities and women
- Recruiting on predominantly minority college campuses
- Advertising job openings in publications targeting minorities

AT RISK

- Special deals with recruiters to bring in only minorities
- Reserving job slots for minorities and women
- Plans based on federal mandates for aggressive minority hiring
- Reserving wireless phone spectrum for women and minorities

Back to the politicians

A Supreme Court ruling will fuel the fight over affirmative action

For months, the Supreme Court case of *Adarand Constructors v. Peña* was shaping up as a landmark. The issue—reserving federal contracts for minorities—stirred emotions nationwide. Politicians, especially Republican challengers to President Clinton, jockeyed for position. And the people most affected by the controversy—minorities, women and frustrated white men—pleaded their causes from the sidelines.

But when the court finally rendered a judgment last week, it was something less than a bombshell. The justices were as divided as the nation over affirmative action, unable to decide even the case at hand: whether the U.S. Transportation Department had unfairly favored a Hispanic contractor over the white-owned Adarand firm when awarding a Colorado guardrail contract. And the principles that a 5-4 court majority agreed on are so abstract that rather than settling the issue, the decision promises to set off more political wrangling and litigation.

There was little doubt, however, about the court's overarching message: Racial preferences are rarely acceptable. Writing for a splintered majority, Justice Sandra Day O'Connor declared that when government gives a helping hand to minorities, remedies must be "narrowly tailored" to serve "compelling" government interests. Thus, the court applied the same "strict scrutiny" standard to federal policies that it had applied to state and local affirmative action policies when it stopped Richmond, Va., from reserving 30 percent of its business for minorities. Civil rights advocates call the trend ominous, especially after the court last week also limited a judge's authority to desegregate the Kansas City, Mo., schools. In coming days, the justices will rule on congressional districts drawn to favor blacks in Georgia and Louisiana.

The Colorado decision has left plenty of room for political maneuvering. The White House expects even more pressure to defend affirmative action. Liberals angry about Clinton's new budget cuts "feel like they've been thrown against the wall," says a senior presidential aide. "They want us to fight, to draw the line." To buy time, Clinton promised to defend affirmative action that is "carefully justified" and ordered aides to sort through dozens of programs that provide more than $10 billion a year in aid to minorities to see which are likely to pass muster under the new ruling. Some Democratic leaders want the issue handed over to a presidential commission. New Mexico Rep. Bill Richardson, a Hispanic caucus member, says such a panel would "defuse the issue and get us a little cover."

New curbs? Republicans, however, embraced the ruling as a mandate for further cuts in affirmative action. House Speaker Newt Gingrich assailed policies "based on genetic codes that exploit a lawyer-defined system." Senate Majority Leader Bob Dole and Florida Rep. Charles Canady soon will push legislation to prohibit making race a factor in decisions on federal contracts, benefits and hiring. Canady said the court had recognized that racial "preferences tend to reinforce rather than reduce prejudice." Congressional strategists are preparing anti-preference amendments to appropriations bills and measures chartering agencies like the Small Business Administration that offer federal aid. Critics also will focus on how President Clinton implements a new procurement law that allows agencies to withdraw contracts from competitive bidding and award them to a "disadvantaged" company if at least two such firms seek the work. The Associated General Contractors of America terms the measure a "special-preference extravaganza."

But legislation curbing set-asides is no sure bet, and if it passed Congress it

JIM LO SCALZO – USN&WR

A BOOST FROM THE FEDS. Fernando Galaviz, whose Virginia firm receives Small Business Administration aid, argues that the SBA program is "compatible" with the new Supreme Court ruling. But he says more could be done to weed out ineligible applicants for grants.

would probably draw a Clinton veto and create an emotional 1996 campaign issue. Many executives of major companies prefer not to reopen the divisive issue; Republican moderates, reports an insider, are cautioning that "this issue is explosive—let's not deal with it."

Still, minorities worry they will take a hit. "The decision has created a climate of fear," says Anthony Robinson of the Minority Business Enterprise Legal Defense and Education Fund. In Philadelphia, where a local set-aside remains under court challenge, Enoch Heggs, an African-American who heads a construction firm, predicts that "many of us in this business are going to get wiped out."

Mixed record. The fallout from the 1989 Richmond case offers a rough guide to what may lie ahead. After the decision, some 230 state and local set-aside arrangements were suspended while advocates searched for evidence to justify them. In the years since, about 100 have re-emerged, a net loss for minorities but far from a wipeout. The mixed picture is reflected in a string of lawsuits. In San Francisco, black architects and engineers pointed out that they had received only two city contracts in a year even though they constituted 8 percent of the available pool. "We demonstrated that affirmative action is legally defensible," says civil rights lawyer Theodore Wang. In the past three years, local government contracts for minority-owned firms have thrived, more than doubling to $55.5 million and 13.4 percent of the total.

But the tide may have turned against affirmative action. Opponents of racial preferences have mounted strong cases against complex "disparity studies" compiled by municipal consultants who analyze local labor markets to help prove that minorities are underrepresented in certain job categories. In one prominent case, a federal judge in Philadelphia ruled in January that the evidence did not justify a 15 percent set-aside of city contracts to blacks. The judge rejected as "unadorned speculation" a report by economist Andrew Brimmer on how bias might have suppressed bids by black contractors over the years. A Denver disparity study was rejected recently by a federal appeals court, and another test case is pending in Columbus, Ohio.

Although the legal battle over federal set-asides will be just as divisive, much of the $4 billion-plus worth of minority contracts the Small Business Administration awards each year may survive. Fernando Galaviz, the head of a firm in the Virginia suburbs of Washington, D.C., that services government computers, notes that the agency requires applicants to "show how you personally experienced prejudice." Galaviz, who remembers signs in Texas proclaiming "No Mexicans or Dogs Allowed," has organized a group of SBA beneficiaries to fight for continuing preferences in line with the court ruling.

Other set-asides will prove more controversial. The Associated General Contractors charges that the Pentagon is reserving major contracts at some bases for minorities to help reach a 5 percent average for military procurement nationwide. Charles Gaasland, who heads the New Mexico unit of white-owned C. S. McCrossan Construction Inc., says he was "absolutely stunned" last fall when officials at the White Sands Missile Range earmarked a $30 million road-repair contract for minorities. Gaasland, whose firm has spent $30,000 in legal fees filing protests, says that "nobody should be included or excluded from bidding because of race or national origin."

Gaasland's company may have a good case, but the national debate is just beginning. Civil rights advocates are confident. "It will be easy to show discrimination in federal programs because the patterns are so stark and the federal government is so large," says Penda Hair of the NAACP Legal Defense and Educational Fund. But others note that the high court avoided giving a blueprint for exactly how the wide array of federal preferences should be judged. "Repairing roads is different from giving scholarships or building embassies abroad," says George LaNoue, a University of Maryland political scientist who serves as an expert witness in set-aside cases.

DAVID BUTOW – SABA FOR USN&WR

SETTING ASIDE TOO MUCH? The Supreme Court case may help contractor Charles Gaasland, who is fighting a federal decision to reserve road-repair work at White Sands Missile Range for disadvantaged firms. "Because we're white, we can't bid on this project," he complains.

California will serve as an early testing ground. Plans by GOP presidential hopeful Gov. Pete Wilson to publicize the cost to taxpayers of state government racial preferences may fuel support for a ballot measure to ban them. Add the new signals from the Supreme Court, says Washington civil rights lawyer John Payton, and it is clear that "it will take a lot of political will to save affirmative action—many programs will fall by the wayside." ■

BY TED GEST WITH STEVEN V. ROBERTS, KENNETH T. WALSH, JIM IMPOCO IN CALIFORNIA AND KAREN MITCHELL

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EEOC
PHOENIX DISTRICT
OFFICE

The Salt Lake Tribune UTAH Saturday, June 10, 1995

EEOC Seeks to Intervene in Sex-Harassment Suit

By Mike Carter
THE ASSOCIATED PRESS

The U.S. Equal Employment Opportunity Commission has asked to intervene in a woman's sexual-harassment lawsuit, apparently the first time the federal agency ever has sought sanctions in Utah.

The EEOC petitioned U.S. District Judge Dee Benson to join in the case filed by Jennifer Bottomly, a former paralegal at American Investment Bank who sued her boss, Thomas L. Monson, the bank, another related firm and their parent company, Leucadia National Corp.

EEOC regional attorney Richard R. Trujillo said from the agency's Phoenix office that the intervention is justified because of the "egregious nature" of the alleged incidents, including evidence that Monson and the companies retaliated against Bottomly when she complained to the state Anti-Discrimination Division and EEOC.

Monson's attorney, Ellen Maycock, said she has not decided whether her client will oppose the EEOC's intervention.

The EEOC petition was filed May 31. No hearing on the matter has been set.

Bottomly was fired, the lawsuit claims, after being assured her job was not in jeopardy. After she went to the state and EEOC, Monson filed a civil defamation lawsuit against her in state court.

In her lawsuit, filed a year ago, Bottomly claimed that Monson, a former senior vice president and general counsel at AIB, had become obsessed with her "personally and sexually" during her employment there from 1990 to 1993. Bottomly is seeking at least $1 million, with the final amount to be determined at trial.

Monson, the lawsuit claimed, stalked her, tried to kiss her, searched her belongings, listened to her conversations and repeatedly propositioned her. He also wrote love notes and left "lewd" materials on her desk, including an explicit drawing of two people having sex, according to court documents.

Bottomly claims she complained to Monson's superiors and filed a complaint with the company in 1993. All the while, she said, she was assured her job was not in jeopardy.

Monson was fired Sept. 7, 1993. In a deposition, he said he was let go for using poor judgment in his relationship with the woman.

Bottomly claims that she was twice assured after Monson was terminated that her job was safe. Six days later, she was fired after being told an internal investigation showed her claims to be groundless and, according to her complaint, that "her interests were different from AIB."

Her lawsuit claims that Leucadia, a New York-based holding company, American Investment Financial and American Investment Bank "were aware of this offensive and unlawful harassment and tolerated, ratified and fostered it, and failed to take appropriate remedial action to stop it."

In November 1993, Bottomly went to the state and EEOC. Two months later, Monson sued her for defamation in state court, then sought to have the file sealed at least partly to protect his family.

He is the eldest son of Thomas S. Monson, second counselor to the president of The Church of Jesus Christ of Latter-day Saints.

Trujillo said the EEOC likely will seek both monetary sanctions and injunctions against the companies.

SUMMARIES OF LABOR AND EMPLOYMENT LAW CASES IN WHICH U.S. SUPREME COURT DENIED REVIEW ON JUNE 19, 1995

94-1852 ALLEY v. GENERAL ELECTRIC CAPITAL CORP.

Age—Pretext—Summary judgment.

Ruling below (*Schultz v. General Electric Capital Corp.*, CA 7, 37 F.3d 329, 65 FEP Cases 1881):

To establish pretext at summary judgment stage in suit against employer under Age Discrimination in Employment Act, protected-age employee must produce evidence from which rational fact-finder could infer that employer lied about its proffered reasons, and former marketing manager failed to produce such evidence in his ADEA suit against employer; former marketing manager's contention that report on which superior relied to discharge him may not have been most accurate indicator of his performance does not establish that employer's reliance on report was pretextual, when report also indicated poor performance on behalf of 27-year-old employee who was also terminated, and other reports that former manager points to do not say that superior knew that his reliance on disputed report was invalid; employer's description of termination as layoff in letter announcing former manager's severance does not demonstrate that employer's explanation that it discharged him for poor performance was pretextual, because employer adequately explained reasons for describing termination in that way, employee admits that his superior told him that he was being terminated for performance deficiencies, and nothing in characterization of termination in letter can be construed as evidence of pretext; accordingly, summary judgment for employer is affirmed.

Question presented: Does *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), burden on nonmovant responding to summary judgment motion empower court to itself weigh competing inferences from evidence and to itself resolve disputed facts, when nonmovant has offered sufficient indirect evidence to allow trier of fact to make finding of pretext?

Petition for certiorari filed 4/10/95, by Doyle C. Alley, pro se, of Greer, S.C.

94-1775 CAVER v. GERACE

Constructive discharge—Denial of unemployment benefits—Due process.

Ruling below (La CtApp 2dCir, 649 So.2d 389):

Testimony of employer's daughter during unemployment compensation hearing was not hearsay, and, in any case, employee failed to object to admission of testimony and therefore waived any right to complain on appeal; evidence supports conclusion that employee left her employment with law firm for personal reasons when firm required that she report to main office rather than satellite office to which she had been transferred upon her request and that such reasons did not constitute "good cause attributable to a substantial change made to her employment" that would entitle her to unemployment benefits; arrangement allowing employee to work at satellite office closer to her residence was trial arrangement that firm had right to revoke when arrangement failed to work out satisfactorily, firm's demand that employee return to main office was reasonable, and despite increased transportation costs, requiring employee to return to work at main office was not substantial change in employment but rather was in accord with prior agreement between employee and firm.

Questions presented: (1) Can state deny its citizen due process by using informal predeprivational hearing at which conclusions of hearing officer are considered final on substantive issue and, therefore, binding on court? (2) Can informal predeprivation hearing be utilized by state to constitutionally deprive employee of unemployment benefits without any standardized rules of evidence or procedure? (3) Can state court use technical rules of evidence to deprive employee of unemployment compensation benefits by reliance on ruling of informal predeprivational hearing that ignored rules of evidence and instructed employee to waive assistance of attorney? (4) Can state appeals court universally deprive unemployed plaintiff of due process by refusing to review factual substantive conclusions of predeprivational hearing that were based on hearsay, by stating that admission and use of hearsay was not objected to and, therefore, was waived by unrepresented plaintiff at predeprivational hearing?

Petition for certiorari filed 4/27/95, by Carla S. Roberts, and Jordan, Little & Roberts, both of Lafayette, La.

94-1705 BEADLE v. TAMPA, FLA.

Accommodation of employee's religious practices—Undue hardship standard.

Ruling below (CA 11, 42 F.3d 633, 66 FEP Cases 1540):

Municipal police department's neutral rotating shift system for work assignments and its random assignment of recruits to shifts, even when combined with department's policies of not allowing recruits to use vacation or leave time during first six months of employment and not allowing any employees to trade days off, met city's obligations under Title VII of 1964 Civil Rights Act to reasonably accommodate recruit who was Seventh Day Adventist assigned to shift that required him to work on his sabbath; requiring department to grant shift exception to such recruit would result in greater than de minimis cost to employer whose business involves protection of lives and property.

Questions presented: (1) Does court of appeals decision conflict with holding in *Brown v. General Motors Corp.*, 601 F.2d 956 (CA 8 1979), and teaching of *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63 (1977), that employer can be relieved of its obligation to reasonably accommodate employee's religious practices only if available accommodations involve more than de minimis tangible costs, such as payment of premium wages or demonstrable loss of efficiency? (2) Does court of appeals decision reflect serious trend by lower courts to erroneously lower "undue hardship" standard to Title VII's religious accommodation requirement so employers need do nothing when asked for such accommodation? (3) Does court of appeals decision commit manifest error in creating, by judicial fiat, exemption from religious accommodation requirement of Title VII for municipal law enforcement agencies?

Petition for certiorari filed 4/17/95, by Lee Boothby, and Boothby & Yingst, both of Washington, D.C., Harold Lance, of Dunlap, Tenn., and Rolland Truman, of Long Beach, Calif.

94-1668 RAHN v. DRAKE CENTER INC.

Employees—Retaliatory discharge of hospital employee—First Amendment.

Ruling below (CA 6, 31 F.3d 407):

Press release issued by nurse at publicly funded hospital in which she claimed that proceeds of tax levy dedicated to hospital would not be used properly by private corporation that operated hospital under lease from county, and that new work rules for hospital employees could lead to reduced patient care, was "quintessential employee beef from disgruntled employees," not speech addressing matters of public concern; therefore, nurse's First Amendment rights were not violated by her dismissal for allegedly failing to comply with new work rules, even if, as jury found, her discharge for such reason was pretext for discharge for her public comments critical of hospital administrators.

Question presented: Does employee speak about matters of public concern when she complains that tax dollars raised through special levy are not being used for their intended purpose, complains that her employer is engaging in defiant and potentially corrupt activities with regard to future spending of levy funds, and advises public that potential patient endangerment situation exists at public hospital where she is employed?

Petition for certiorari filed 4/6/95, by Paul H. Tobias, David Torchia, and Tobias, Kraus & Torchia, all of Cincinnati, Ohio.

94-1558 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. FRANCIS W. PARKER SCHOOL

ADEA—Disparate impact—Applicants for employment.

Ruling below (CA 7, 41 F.3d 1073, 63 LW 2265, 66 FEP Cases 85):

Employer's pay system that links salary to years of work experience and results in rejection of older applicants whose level of experience automatically commands for them higher salary than employee's salary cap allows, although statistically demonstrated to have disparate impact on older job applicants, is economically defensible and reasonable means of determining salaries that does not violate Age Discrimination in Employment Act absent showing that system is pretext for age-based stereotyping.

Questions presented: (1) Does ADEA prohibit disparate impact discrimination? (2) If so, does ADEA prohibition against disparate impact discrimination protect applicants for employment?

Petition for certiorari filed 3/20/95, by Drew S. Days III, Sol. Gen., Paul Bender, Dpty. Sol. Gen., Irving L. Gornstein, Asst. to Sol. Gen., James R. Neely Jr., EEOC Dpty. Gen. Counsel, Gwendolyn Young Reams, Assoc. Gen Counsel, Carolyn L. Wheeler, Asst. Gen. Counsel, and Gail S. Coleman, EEOC Atty.

94-1541 BEY v. BISBEE

Employees—Discharge—Qualified immunity—Sufficiency of evidence.

Ruling below (CA 10, 93 F.3d 1096):

Sheriff's deputy's 42 USC 1983 claim that he was discharged in retaliation for reporting supervisor's illegal act alleged violation of clearly established constitutional right; deputy present-

ed sufficient circumstantial evidence to create genuine issue of material fact about whether his speech was motivating factor in his discharge by showing that at least two people in sheriff's office read his report, that report number had been assigned to his complaint and entered in computer, and that one employee described report as "common knowledge" around office; accordingly, defendants were not entitled to summary judgment on issue of qualified immunity.

Questions presented: (1) Should government employees be forced to litigate, through trial, civil rights case in which there is no claim upon which relief can be granted as matter of law? (2) Should government employees be forced to litigate, through trial, case in which complete lack of evidence has been presented to defeat qualified immunity?

Petition for certiorari filed 3/17/95, by Karen A. Byrne and Hugh Kenny, both of Cheyenne, Wyo.

End of Text

Regulatory Reform

IMPLEMENTATION OF HR 994 WOULD COST $25 MILLION TO $50 MILLION YEARLY, CBO SAYS

A House bill that would terminate many existing regulations — unless agencies review rules and determine that they are necessary — would cost the federal government $25 million to $50 million annually, according to a congressional estimate obtained by BNA June 19.

The Congressional Budget Office examined the version of HR 994 — the proposed Regulatory Sunset and Review Act of 1995 — that was adopted May 18 by a House Government Reform and Oversight panel. The legislation approved by the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs was drafted by its chairman, Rep. David McIntosh (R-Ind) (97 DLR A-2, 5/19/95).

The bill would require agencies regularly to review existing and future significant rules — defined as those with a yearly economic impact of $50 million or more. In addition, congressional committees and the public could petition agencies to review other regulations.

Agencies would have to determine whether regulations should continue in their current form, be modified or consolidated with other rules, or be allowed to terminate. The legislation would expire seven years after it was enacted.

CBO's analysis estimated that the version of HR 994 adopted by the subcommittee would trigger between 330 and 670 reviews of new and existing rules and existing uncodified rules throughout the entire federal government each year. During the seven years in which the bill would be in force, the government would complete between 2,300 to 4,600 reviews, the budget office wrote.

CBO Estimate 'Still Small Potatoes'

A staff member for the subcommittee contended that some of the assumptions made by CBO in its analysis inflated some of the figures — the dollar estimates and the number of rules involved. Despite this, he told BNA, CBO's bottom line of $25 million to $50 million a year spread over the entire government is "still small potatoes" given the size of the annual federal budget, which runs more than a trillion dollars.

The CBO analysis, dated June 16, said, "The average cost of reviewing an individual rule, as required by HR 994, is small," averaging about $75,000 per review. Examination of some regulations would cost significantly more, while others would run significantly less, CBO wrote.

The staff member noted the Clinton administration's recent regulatory reinvention effort in which agencies scrutinized the *Code of Federal Regulations* line by line with the goal of deleting obsolete or duplicative rules.

"If they can do that kind of review in four months without a single penny," he said, the Executive Branch easily could absorb the cost of carrying out the provisions of HR 994.

The staff member said McIntosh and other Republicans were hopeful that the administration would endorse the bill and work with House members to craft a regulatory review and sunset that would garner support from all sides. But the Office of Management and Budget has indicated that it would not help fashion any kind of regulatory review measure, he said.

Meanwhile, the Government and Reform and Oversight Committee is expected to take up the bill in late June or shortly after the July 4 congressional recess, he said.

Bill Would Not Require Cost-Benefit, Risk Analysis

CBO pointed out that HR 994 would not require that agencies perform cost-benefit analysis or risk assessment for existing rules.

However, CBO said the bill would require both types of analysis if agencies extended, modified, or consolidated existing rules under one condition. These analyses would be mandated if subsequent legislation required new rule-making to undergo risk assessments and examination of costs and benefits.

The House passed a regulatory reform bill March 3 that would require risk assessment and cost-benefit analysis for new regulations, CBO noted (43 DLR A-13, 3/6/95).

"If requirements for cost-benefit analysis and risk assessment were to apply to the sunset reviews for all existing regulations that would be covered by HR 994, the cost of [implementing] HR 994 would increase dramatically," CBO said.

Rep. John Mica (R-Fla) requested the CBO analysis of HR 994.

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- **CORRECTION**

  A witness before the House Economic and Educational Opportunities Subcommittee on Employer/Employee Relations June 15 was

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misidentified at 116 DLR A-14 6/16/95 as Donald Ball, rather than David George Ball, head of the Pension and Welfare Benefits Administration under President Bush.

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Anxious Over Annuities

By Mike Causey
Washington Post Staff Writer

Nail-biting season is here for federal workers. Many say they will retire this year if Congress changes pension rules effective in 1996. Others say changing retirement rules could force them to work several years longer than they planned to get the annuities they are promised under current law.

House Republicans want to raise employee contributions to the retirement plan by 2.5 percent of salary and reduce benefits by basing them on a worker's highest five-year average salary, instead of the high-three system.

The retirement threat has produced a go-now-or-work-longer dilemma for tens of thousands of retirement-age feds.

Unfortunately for planning purposes, workers probably won't know what changes are going to be made until September or October when Congress takes final action on budgets and deficit reduction.

If Congress moves to a high-five system, it likely would be phased in over two years. Next year, annuities would be based on an employee's highest four-year average salary. A worker retiring in 1997 or thereafter would be under a high-five system if the plan became law.

Lots of callers have suggested that Congress "grandfather in" current employees, allowing them to continue under the high-three formula. They say it is unfair to change rules for mid-career workers. But there are two real-world problems with that approach: There was no grandfather clause years ago when Congress switched from the high-five to the high-three formula. Second, grandfathering would delay any cost saving for years.

The high-three to high-five change would save government—and cost workers—$700 million a year.

While many feds focus on that proposed change, the big-ticket item for them is the $12 billion they would lose in salary over the next five years if retirement contributions are raised by 2.5 percent of salary. That payroll surtax on feds is part of the Republican tax cut bill. The Senate and White House oppose it. The money raised by the surtax would go directly to the U.S. Treasury and would help offset tax cuts proposed for upper-income Americans.

Both the House and Senate deficit-reduction plans go along with **President Clinton**'s diet pay raises for workers. Both plans would require agencies to absorb more of the pay raise costs. That would cut money available for other personnel programs, from promotions to training.

Acquisition Reform Session

The National Performance Review will unveil its new Internet-based "Acquisition Reform Net" at the "Real Acquisition Reform" conference Wednesday and Thursday at the Doubletree Hotel-National Airport. The session is sponsored by Government Executive Magazine and the Council for Excellence in Government. The conference will focus on changes in the government's $200 billion-a-year procurement system. The tab is $400 for federal workers, $500 for industry people. Call 202-393-7022.

Maryland NARFE Team

Don Enty is the new president of the National Association of Retired Federal Employees Maryland Federation of Chapters. Others officers include **Martin Wish**, vice president for legislation; **Charlene Cohen**, vice president for membership; **Ira Myrick**, treasurer; and **Jeanette Green**, secretary.

NOVA Winners

The Northern Virginia chapter of the Association of Government Accountants has given its presidential award to the General Accounting Office's **Charles W. Culkin Jr.** and **Kay L. Daly**; the Agriculture Graduate School's **Ronnell B. Raaum**; the Small Business Administration's **Patricia A. Reese**; and the Army Audit Agency's **Peter D. White**. It also gave special leadership and service awards to **John H. Hummel**, **Marcia B. Buchanan**, **Joan S. Hobbs**, **Janice LeRoy** and **Nancy B. Sinclitico**.

Tuesday, June 20, 1995

The New York Times

DATE: 10-20-96

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POLITICS: Assessing the President's Performance

On Civil Rights, Clinton Steers Bumpy Course Between Right and Left

By STEVEN A. HOLMES

WASHINGTON, Oct. 19 — In his nearly four years in office, President Clinton has amassed a civil rights record rivaling that of any President in the last 30 years.

So why do so many civil rights advocates — both liberal and conservative — mistrust him so much?

Since he entered office in January 1993, Mr. Clinton has appointed more women and members of minorities to Cabinet and other high-level positions than any other President. He has appointed the highest percentage of minorities and women to the Federal bench.

He became the first President to back measures to end bias against homosexuals, he stepped up enforcement of fair housing laws, and he stoutly defended the Government's affirmative action role, declaring in a speech in July 1995 that his goal would be to "mend it, not end it."

"If you look at his overall record, both in the appointments he's made and the policies he's pursued," said Wade Henderson, executive director of the Leadership Conference on Civil Rights, a coalition of liberal organizations, "his record stands with the best of recent Presidents, with the possible exception of Lyndon Johnson."

But so tricky and polarizing are the politics of race and sex that the civil rights policies of the Clinton Administration have drawn praise and scorn in equal measure from liberals and conservatives.

With compelling evidence, conservatives say the Administration has pursued classically liberal policies, despite trying to portray itself as moderate. They note that the people Mr. Clinton appointed to enforce anti-discrimination laws came, by and large, from liberal organizations like the NAACP Legal Defense and Educational Fund, the Mexican-American Legal Defense Fund and the National Women's Law Center.

They also say that the Administration sought to expand the legal basis for affirmative action to include the need for a diverse work force, not just to remedy past discrimination.

And they point out that despite Mr. Clinton's promise to change any Federal affirmative action programs found ineffective or resulting in quotas, only one — a Defense Department procurement program — has been scuttled.

"Philosophically, I think they are straight, pro-preference liberals on these issues," said Linda Chavez, president of the Center for Equal Opportunity, a conservative group. "They interpret affirmative action to mean having double standards, having different rules according to race, with attention to the bottom line, according to numbers. There's not a whole lot of difference between the way the Clinton people enforce the law and the way the Carter people did."

But while conservatives complain that the Administration is too liberal on civil rights issues, liberal groups maintain that it has not been bold enough and is too willing to tack in the shifting winds.

They recall that Mr. Clinton quickly abandoned Lani Guinier, a law professor from Philadelphia who was his first choice to head the Justice Department's civil rights division, when her past writings drew fire from conservatives. They note that after the storm that followed his pledge to remove the ban on homosexuals in the military, the President put forward a policy that left the ban in place.

He delayed filling important civil rights posts, squandering what civil rights groups said had been an opportunity to undertake new initiatives while the Democrats controlled Congress. And he signed a welfare bill that civil rights advocates say will throw at least a million children into poverty.

Even Mr. Clinton's stand in defense of affirmative action, perhaps the defining civil rights moment of his Presidency, was taken with the knowledge that abandoning the policy would have meant a certain Presidential primary challenge from the Rev. Jesse Jackson.

"There is no question about it," Mr. Jackson said in a recent interview. "My position on it was quite public, and I stated it to him. I had no inclination to run. My choice was, rather, to support him. But if he had taken away that program for equal opportunity, he would have crossed the line."

Mr. Clinton's aides deny that the prospect of a Jackson challenge in the primary figured in the President's decision to support affirmative action. But that Mr. Jackson would make such a threat is indicative of what some critics regard as the President's primary failing: that he responds more to political considerations than to those of principle.

"There isn't the malevolence that there was in the Reagan Administration or the indifference that there was in the Bush Administration," said an official with a Hispanic organization who spoke on the condition of anonymity. "But there is a calculating approach to the issue that is principally politics driven."

Mr. Clinton has argued that he was seeking innovative ways to look at the divisive issues of race, ethnicity, class and sex. And in what could be read as a metaphor for his general approach to civil rights issues, Mr. Clinton, in the debate this week, touted the middle ground he had staked out on affirmative action.

"I'm against quotas — I'm against giving anybody any kind of preference for something they're not qualified for," he said. "But, because I still believe that there is some discrimination and that not everybody has an opportunity to prove they are qualified, I favor the right kind of affirmative action."

In fact, as Mr. Clinton seeks another term, his advisers and leaders of some liberal groups would argue that his stand on affirmative action has shored up support for the policy and effectively removed the issue, and with it, race, from the Presidential campaign.

"A year ago, I thought affirmative action was going to be the ultimate wedge issue in this campaign," said Linda Williams, a political science professor at the University of Maryland. "It's just disappeared."

Mr. Clinton's advisers have no doubt about why. "I think that President Clinton deserves credit for that, both for what he did in 1992 and what he's done since," said George Stephanopoulos, a senior adviser to Mr. Clinton, in a recent interview at his office. "The way he's talked about civil rights issues has raised the bar for opponents."

The Expectations

What They Heard, What They Saw

From the start, Bill Clinton seemed to be a different kind of politician when it came to civil rights issues.

From early childhood, when he watched his grandfather's respectful and courteous

cont'd

The Washington Times

DATE: 10-19-96

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Settlement with news media reached in ATF-Davidian suit

Paper, TV station admit no wrongdoing but will pay

WACO, Texas (AP) — Two Waco news organizations and federal agents have reached an out-of-court settlement, ending a two-year lawsuit claiming reporters helped bring about the deadly 1993 Branch Davidian raid.

The settlement reached late Wednesday included no admission of wrongdoing or acceptance of liability, attorneys for the Waco Tribune-Herald and KWTX-TV said Thursday. Other terms were not disclosed.

The media companies and American Medical Transport were sued by the families of four U.S. Bureau of Alcohol, Tobacco and Firearms (ATF) agents killed during the raid Feb. 28, 1993. Other agents joined the suit, claiming the defendants' actions contributed to the tragedy.

More than 20 agents were wounded in the firefight that broke out when federal officials tried to arrest sect leader David Koresh for alleged weapons violations. Six Branch Davidians also died in the battle.

After a 51-day standoff, Koresh and 80 of his followers died in a fire that destroyed the compound as authorities were punching holes in the compound walls with battering rams.

An American Medical Transport employee admitted to tipping the Waco TV station about the raid. Investigations by the Texas Rangers and the U.S. Treasury Department determined that a KWTX cameraman inadvertently alerted a sect member to the raid less than two hours before it began.

The agreement included an undisclosed financial settlement for American Medical, a local ambulance company hired by the bureau. The company provided medical support for the raid, several attorneys involved in the case said.

The Waco Tribune-Herald's parent company president, Jay Smith, said the settlement was a business decision by Cox Newspapers Inc.'s insurance carrier.

He said Cox officials believed they could have won the case.

Tribune-Herald Publisher Dan Savage said the lawsuit will have no bearing on how the paper covers the community.

"We feel like we had no liability whatsoever in this because there was no basis in fact in the remaining allegation against us," Mr. Savage said. "We have nothing to hang our head over."

One of the agents, Mike Russell, said the case never should have dragged on this long.

"It just goes to show the arrogance of those people at the newspaper and TV station. They could have settled for a lot less two years ago with a simple admission of wrongdoing and an apology. Now it's cost them a lot of money," said Mr. Russell, based in Fort Worth.

treatment of black patrons at his grocery store in Hope, Ark., Mr. Clinton has exhibited a comfort and ease in his personal dealings with members of minority groups, especially blacks. He has displayed, and almost flaunted, his familiarity with black culture, black music and black icons. He has looked at home in black churches, singing well-known African-American hymns by heart and even preaching with the cadence and idioms of a black Baptist minister.

Ernest Green, a black investment banker in Washington who has known Mr. Clinton for years, recalls a conversation with the President and a number of prominent blacks on Air Force One last January. At one point, Vernon E. Jordan, Mr. Clinton's close friend and confidant, remarked that the President was one of the few white people who knew by heart all three verses of "Lift Every Voice and Sing," a hymn often sung at civil rights gatherings and called the "Negro national anthem" by many blacks.

"I said, 'Mr. President, I beg to differ,'" Mr. Green said. "'You are one of the few people, period, who know all three verses.'"

Yet as Mr. Clinton prepared to take office four years ago, both traditional civil rights groups and their conservative antagonists viewed the occasion with a mixture of hope and trepidation.

As a candidate, Mr. Clinton had criticized the civil rights record of his Republican predecessors George Bush and Ronald Reagan, who often seemed hostile or indifferent to civil rights issues. Mr. Clinton promised to push for proposals like legislation that would allow people to register to vote when they renewed their driver's licenses or applied for government benefits. He also promised to end discrimination against homosexuals, press for statehood for the District of Columbia and remove limits on the monetary damages women could win in sex-discrimination suits.

But if Mr. Clinton was expected to lead liberal civil rights groups out of the political and policy Sinai, there were indications that he might be an uncertain Moses. He had campaigned as a "new Democrat," one more moderate than the Democrats of old.

At times, he trumpeted his disagreements with groups like the National Association for the Advancement of Colored People or the National Organization for Women.

"Clinton spoke a language of racial moderation," said Will Marshall, director of the Progressive Policy Institute, a right-of-center Democratic research and advocacy organization. "He spoke of reciprocity — rights and responsibilities — rather than the language of grievance and entitlement."

In January 1992, a little more than three weeks before the New Hampshire primary, Mr. Clinton, then Governor of Arkansas, left the campaign trail and went home to approve the execution of Ricky Ray Rector, a black inmate who was mentally impaired, for killing a white police officer. On June 13, 1992, Mr. Clinton took the stage at the convention of the National Rainbow Coalition, Mr. Jackson's organization, and chastised Sister Souljah, a black rap artist, for flippantly suggesting that blacks take "a week and kill white people."

In the transition to the Presidency, Mr. Clinton criticized women's groups that were pressing him to appoint more women to his Cabinet, snapping at them for being "bean counters."

Such utterances were unusual coming from a Democrat and caused uneasy feelings among civil rights advocates.

"I think the black community felt they had invested heavily in Bill Clinton, had helped to elect him and had big expectations," said Milton Morris, senior vice president of the Joint Center for Political and Economic Studies, a research group. "But there also was some apprehension. This whole 'new Democrat' thing scared a lot of people."

Once elected, Mr. Clinton assembled a Cabinet that included four blacks, three women and two Hispanic men. Some, like Attorney General Janet Reno or Commerce Secretary Ronald H. Brown, were given jobs generally reserved for white men.

And of Mr. Clinton's 182 judicial appointees, 32 percent have been women, 20 percent black and 7 percent Hispanic, a far higher percentage than that of any other President. Those appointments could be critical in future policy questions, as Congress has tended to defer to the courts in the areas of affirmative action and gay rights.

Despite that record, however, it took the Administration nearly two years to fill important civil rights posts in the Administration. The pace, which contributed to the anxieties of civil rights groups, was a direct result of what they viewed as Mr. Clinton's disastrous handling of one of his earliest appointments, the nomination of Ms. Guinier to the top civil rights job in the Government.

The Appointments

An Abandonment Brings Turmoil

More than any other single event, the Guinier episode sent shock waves through traditional civil rights groups.

Ms. Guinier, a professor at the University of Pennsylvania Law School, had been a good friend of the President and his wife, Hillary. She had been a classmate of both at Yale law school, and they had attended her wedding on Martha's Vineyard in 1986. Moreover, she had built a reputation with the NAACP Legal Defense Fund as an innovative thinker in the area of voting rights. To many, she seemed a natural for the position of Assistant Attorney General for civil rights, considered the top civil rights position in the Federal Government.

But soon after her nomination was announced in May 1993, it began to run into trouble. In her writings, Ms. Guinier had suggested alternatives to the system of trying to guarantee blacks and other minorities representation by drawing gerrymandered districts in which blacks constituted a majority of voters.

But her proposals, including ideas like cumulative voting and proportional representation, were theories that went against the American idea of one-person-one-vote and majority rule. They were clearly outside the mainstream of American thought and were characterized by her conservative critics as dangerously radical.

Faced with strong opposition, even within his own party, Mr. Clinton withdrew Ms. Guinier's nomination a month later, declaring that if he had read her early writings, he would not have nominated her to the post. Moreover, the President jettisoned Ms. Guinier without letting her appear before the Senate Judiciary Committee, as her supporters had urged, to explain her views.

The decision enraged civil rights advocates and deepened their suspicion of Mr. Clinton. "There was a profound sense of

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Civil Rights

betrayal in his unwillingness to stand with her and defend her as a reflection of what this Administration believed in," said one civil rights leader who spoke on the condition of anonymity. "We felt that this was a President who was not willing to put his reputation on the line, and you questioned whether he would be with you when the going got tough."

Mr. Stephanopoulos acknowledged that the White House had mishandled the Guinier nomination, primarily by not thoroughly reviewing her work before putting her name forward. The Presidential adviser also acknowledged that the episode had contributed to the unease with which many civil rights groups viewed the new Administration.

"I think it raised questions," he said. "I don't think that was fair, but I think it did."

The Guinier episode had other implications as well. Determined not to be burned again, the Administration carefully consulted with liberal organizations and with groups like the Congressional Black Caucus on its subsequent nominees for top civil rights positions. That resulted in a number of candidates being rejected and stretched out the process. It was not until Feb. 1, 1994, almost 14 months after the President took office, that Deval Patrick, a lawyer from Boston, got the job.

Other civil rights appointments were delayed as well, in part because the Administration — despite Mr. Clinton's criticism of "bean counters" — wanted to fill certain posts with representatives of particular racial or ethnic groups.

The Administration also had a difficult time agreeing on candidates with civil rights groups and the Black Caucus.

"The President's slow pace of appointments to key civil rights posts would prove damaging to hopes that momentum in civil rights enforcement would be established," the Citizens Commission on Civil Rights, a private watchdog group, wrote in 1994.

On Sept. 29, 1994, the Senate confirmed Gilbert Casellas as head of the Equal Employment Opportunity Commission, the last major unfilled civil rights position in the Administration.

Five weeks later, the Republicans won control of both Houses of Congress. For most of the next year, the Administration was on the defensive.

Cont'd

The Defining Moment

On Cautious Path, As the Court Nods

In an interview on a television talk show on Feb. 5, 1995, shortly after the new Congress convened, Bob Dole, who had become the Senate majority leader, was asked his views about a California ballot initiative that would declare that race or color could "not be a criteria for either discriminating against or granting preferential treatment to anyone."

After making some preliminary comments, Mr. Dole said, "Why did 62 percent of white males vote Republican in 1994? I think it's because of things like this, where sometimes the best-qualified person does not get the job because he or she may be of one color — and I'm beginning to believe that may not be the way it should be in America."

The comments by Mr. Dole, widely considered at that time to be the front-runner for the Republican Presidential nomination, were the beginning of troubling news for supporters of affirmative action programs.

Senator Phil Gramm, a Texas Republican who was another contender for his party's Presidential nomination, had announced he would make opposition to racial and sex "preferences" a centerpiece of his campaign.

The voter initiative in California was gaining ground (it made the Nov. 5 ballot), suggesting strongly that affirmative action would be a major issue in the Presidential campaign in that vote-rich state. On Feb. 21, the House voted to abolish a set of tax breaks given to communications corporations that sold their companies to minorities.

Worried about the mounting legal and political challenges, Mr. Clinton called a group of House Democrats to the White House and told them the Administration would be conducting an "urgent review" of Federal affirmative action programs.

"It had become a hot thing in Republican politics," Mr. Stephanopoulos said. "The President said, 'I want to be able to defend the defensible, and in order to do that, I need the facts.' "

White House officials sought to assure minority and women's groups that the Administration would not abandon affirmative action programs. But liberal groups were not so sanguine.

"I think, in all candor, there were real questions of where this guy was going to come out on this critical issue," said Mr. Morris of the Joint Center for Political and Economic Studies. "There were people who had reason to believe here was another area where he might cave."

A spirited discussion broke out in the White House. On one side were those who felt the Administration should back away from race and sex-based affirmative action, either out of principle or to reach out to working-class white men. On the other were those urging the President to hold fast — on principle and to avoid alienating the party's base among black and Hispanic voters and liberal and moderate women.

After a review that took five months, Mr. Clinton opted to defend affirmative action, declaring that the policy was needed to address "the systematic exclusion of individuals of talent on the basis of their gender or race." He said, however, that his Administration would review all programs to determine whether any used quotas, discriminated against whites or were continued when they were no longer necessary.

"When affirmative action is done right, it is flexible, it is fair, and it works," Mr. Clinton said in his July 1995 speech.

Administration officials proclaimed that Mr. Clinton had reached his decision out of principle; critics said it was political pandering. Amid the assertions, one major event does stand out.

On June 12, 1995, the Supreme Court, in a 5-to-4 ruling in a case called Adarand Constructors v. Pena, upheld Federal affirmative action programs but said steps had to be taken to insure that programs were justified and that their implementation did not run roughshod over the rights of whites.

While civil rights groups initially bemoaned the High Court's decision, it soon became clear that the decision carried an enormous political silver lining for the Administration.

In effect, the Justices had said, mend it but don't end it. As a result, the decision allowed the Administration to modify affirmative action programs in ways that pre-empted the criticisms raised by Republicans while fending off liberals by saying that changes were mandated by the Court.

"It set the outer bounds," Mr. Stephanopoulos said, "because it was harder for the opponents of affirmative action to argue with doing away with it when a conservative Supreme Court had not ruled it illegal."

It was, some political analysts say, the defining moment of Mr. Clinton's Presidency in the civil rights area, and it knocked the pins out from under his opponents. Outflanked by Mr. Clinton, the Republicans, especially Mr. Dole, backed away from the affirmative action issue.

Though Mr. Dole introduced legislation in the Senate to gut Federal affirmative action programs, he never pressed it, and the 104th Congress ended last month without having enacted any broad-based ban on Federal "preference" programs.

"As the President demonstrated in affirmative action, just the use of the bully pulpit can change the debate," said Charles Kamasaki, senior vice president with the National Council of La Raza, a Hispanic advocacy group. "We were in a free fall on affirmative action until the time the President made his speech. And almost since that time, from a policy perspective, the Republicans have been on the defensive."

Affirmative Action

JUSTICE DEPARTMENT PLAN WOULD CHANGE AFFIRMATIVE ACTION IN FEDERAL CONTRACTS

The Justice Department May 22 proposed changes in the Clinton administration's use of affirmative action policies in awarding federal contracts by tightening certification and eligibility requirements for companies claiming minority status.

The plan would ban for two years minority set-aside programs in which only minorities can bid on contracts, and would establish benchmarks—which DOJ spokesmen insist are different than quotas—to assess when preferential treatment of minorities is no longer necessary. After two years, minority set-asides would be re-evaluated.

The proposed changes will appear in May 23 *Federal Register*, followed by a 60-day comment period. The goal is to insulate the government from legal challenges that could be mounted in the wake of the Supreme Court's 1995 landmark decision that limited the federal government's affirmative action efforts.

Citing discrimination in lending and bonding and bigotry by some craft unions, prime contractors, and suppliers, Associate Attorney General John Schmidt said the government has made "a very powerful case for affirmative action in procurement."

The proposed reforms were also spurred by a review of federal affirmative action plans ordered by President Clinton last year.

The proposals would apply to federal agencies and would tighten the eligibility standards for firms seeking to establish minority status. The plan would include a mechanism to compare various industries by reviewing the number of federal contracts held by minorities with an ideal "benchmark." Schmidt insisted that benchmarks differ from quotas, because benchmarks merely identify targets.

Adarand Challenges In The Air

Assistant Attorney General Deval Patrick told reporters that possible legal challenges to the federal government's use of affirmative action criteria in the award of contracts have been "in the air" since the U.S. Supreme Court's 1995 decision in *Adarand Constructors Inc. v. Pena* (67 FEP Cases 1828).

Justice Department officials said they hope the proposals will strike a balance between the administration's desire to continue policies aimed at remedying the effects of discrimination and the need to follow the Supreme Court's mandate.

Technically, the Justice Department proposal affects firms owned by socially and economically disadvantaged individuals (SDB's). A department spokesman told BNA that most SDBs are minority owned.

About 6.4 percent of federal government contracts are with SBDs, according to the department.

No Set-Asides For Two Years

The proposals would tighten the certification and eligibility requirements for who can claim to be a minority for federal procurement purposes. Currently a firm merely checks a box on a form.

Under the proposal, every applicant would be required to submit with each bid a certification that the business is owned and controlled by "designated socially and economically disadvantaged individuals," and each bid would have to be accompanied by a form, certifying that the firm qualifies for minority status.

The department would prosecute those who misrepresent their eligibility, and the government would conduct periodic audits of certified firms.

The changes would also increase the use of measures that stand no chance of running afoul of the Constitution or inviting a lawsuit, such as "outreach and technical assistance."

The new system would be monitored by the Commerce Department, which would use data already collected by the government to evaluate the percentage of contracting dollars awarded to minority-owned businesses.

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When Commerce concludes that the use of race-based measures are no longer necessary, their use would cease.

'No Pleasing Some Critics'

In *Adarand*, the Supreme Court imposed "strict" judicial scrutiny—which already applied to state and local affirmative action programs—to federal affirmative action plans. Under a strict scrutiny standard, affirmative action plans can be struck down unless they serve a compelling government interest and are narrowly tailored to serve that interest.

On a 5-4 vote, the high court in *Adarand* reinstated a reverse discrimination challenge to a Small Business Administration program filed by Adarand Constructors Inc., a white-owned Colorado company that lost a construction project to a minority-owned contractor despite being the lowest bidder (113 DLR AA-1, E-1, 6/13/95).

The plan was accompanied by a lengthy appendix, which laid out the Clinton administration's evidentiary basis for believing that the government has compelling reasons for favoring minorities when awarding contracts.

The proposals include what department officials called "race-neutral" efforts that are "not Constitutionally problematic," and calls for regular review of affirmative action efforts, to insure that the approach is narrowly tailored.

"There's no pleasing some critics," Patrick said, but "we believe we have a system that can be defended under *Adarand*."

(Text of the department's proposed rule, summary sheet, and appendix appear in Section E.)

—By *Barbara A. Yuill*

Affirmative Action

CLINTON ISSUES ORDER ON EMPOWERMENT CONTRACTING TO HELP DISTRESSED AREAS

President Clinton May 21 signed a long awaited executive order on "empowerment contracting," which seeks to encourage business activity in economically distressed areas by providing incentives to "qualified" large or small business bidders.

The incentives would apply to the evaluation of offers for government contracts in unrestricted competitions, i.e., competitions not reserved specifically for certain groups or individuals.

Under the order, an "area of general economic distress" is defined, for all urban and rural communities, as any census tract that has a poverty rate of at least 20 percent or any designated federal empowerment zone, supplemental empowerment zone, enhanced enterprise community, or enterprise community. In addition, any additional rural- or Indian-reservation-area can be designated as an area of general economic distress after considering the following factors: unemployment rate; degree of poverty; extent of outmigration; and rate of business formation and business growth.

The executive order requires large businesses to employ a "significant number" of residents from the area of general economic distress in order to be eligible for the contracting incentives. But small businesses will not have to meet this criterion, provided they meet one of two other criteria.

A "qualified large business" is defined as a large for-profit or not-for-profit trade or business that:

- employs a significant number of residents from the area of general economic distress; *and*
- either has a significant physical presence in the targeted area or a direct impact on generating significant economic activity in the area.

A "qualified small business" means a small for-profit or not-for-profit trade or business that:

- employs a significant number of residents from the area of general economic distress;
- has a significant physical presence in the targeted area; or
- has a direct impact on generating significant economic activity in the area of general economic distress.

The order requires the secretary of Commerce, in consultation with other agencies and the Office of Federal Procurement Policy, to develop policies and procedures to implement the intended purpose, which is "to strengthen the economy and to improve the efficiency of the federal procurement system by encouraging business development that expands the industrial base and increases competition."

The order says: "Fostering growth of federal contractors in economically distressed communities and ensuring that those contractors become viable businesses for the long term will promote economy and efficiency in federal procurement and help to empower those communities."

By casting the empowerment contracting policy as making good economic sense (i.e., by helping businesses located in blighted areas, the pool of competition is enlarged) rather than as serving a social purpose (e.g., helping minorities or promoting diversity in the federal contracting workforce), the administration hopes to avoid a constitutional challenge. Specifically, it hopes to avoid the "strict scrutiny" standard imposed by the U.S. Supreme Court in its June 1995 decision in *Adarand Constructors Inc. v. Pena* (67 FEP Cases 1828).

SUMMARY OF JUSTICE DEPT. PROPOSED REFORM OF AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT RELEASED MAY 22, 1996

SUMMARY
JUSTICE DEPARTMENT PROPOSED REFORM OF AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT
May 22, 1996

• This document summarizes a proposal for reform of race-conscious affirmative action measures in federal procurement that target assistance to minority-owned businesses through programs that aid small firms that are owned by socially and economically disadvantaged individuals ("SDB's"). The proposal is designed to ensure that such programs comport with the Supreme Court's ruling last June in *Adarand constructors, Inc. v. Peña*, which held that federal race-conscious based affirmative action programs are subject to the constitutional standard of strict scrutiny.

I. CERTIFICATION AND ELIGIBILITY

• SDB programs assist small firms owned by individuals that are disadvantaged socially (subjected to racial or cultural bias), and economically (that bias has led to decreased economic opportunities compared to others). Applicants to these programs will be required to submit a form to the procuring agency verifying their eligibility.

• Members of designated racial and national origin groups presently are presumed by statute to be socially and economically disadvantaged. The proposal does not affect those presumptions. Under the proposal, nonminority applicants may establish by preponderance of evidence — instead of the current clear and convincing standard — that they are socially and economically disadvantaged. This change will open SDB participation to more women and nonminorities.

• All applicants to SDB programs will be required to submit a certification from an SBA approved organization verifying that the individuals claiming disadvantage own and control the company as defined by SBA regulations.

II. RACE-NEUTRAL MECHANISMS

• Agencies will be required to maximize the use of technical assistance, outreach, and other race-neutral means to increase minority opportunity and participation in federal procurement, thereby decreasing reliance on race-conscious mechanisms.

III. ESTABLISHMENT OF BENCHMARK LIMITATIONS

• In order to ensure that race-conscious procurement is not used unnecessarily, benchmarks will be developed for each industry in which the government contracts. Benchmarks will seek to measure the level of minority contracting that would exist absent the effects of discrimination.

• Benchmarks will be calculated by combining the capacity of available minority firms in the industry with an adjustment, where applicable, for the amount that discrimination has suppressed that availability.

IV. APPLICATION OF BENCHMARK LIMITATIONS

• Where minority participation falls below the benchmark, a price or evaluation credit — not set-asides — will be authorized for the evaluation of bids by SDBs and prime contractors who commit to subcontract with SDBs.

• When SDB participation exceeds the benchmark, the credit would be lowered or suspended. When that occurs, the SBA concurrently will limit the use of the 8(a) program in that industry by restricting entry, speeding graduation, or restricting the number of 8(a) awards in the industry.

• After this system is in place for two years, a thorough review will be conducted, and changes to the amount and methods of assistance would be considered at that time.

End of Text

PROPOSED REFORM AND APPENDIX AVAILABLE IN OCLA @ EXTENSION 4905.

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U.S. Retreats On Contracts For Minorities

By STEVEN A. HOLMES

WASHINGTON, May 22 — Inching toward an overhaul of Federal affirmative action programs, the Clinton Administration today issued tentative guidelines that would scale back the ability of Federal agencies to set aside contracts for minority-owned companies.

The guidelines announced by the Justice Department are also intended to root out fraud in awarding of Federal contracts under affirmative action programs. They would require Federal agencies to use "race-neutral" means to increase the number of minority companies receiving contracts, and to make it easier for companies owned by "disadvantaged" whites to receive preferential treatment in winning contracts.

In the last fiscal year, 6,000 companies participated in the program run by the Small Business Administration that provided business and technical advice as well as $5.8 billion in Federal contracts for "disadvantaged" companies. Of those, 32 were not minority owned.

Despite today's announcement, officials said the guidelines would not take affect until the end of the year and could be altered depending on the public response.

Much of the announcement had been disclosed to reporters in recent months, so the proposals announced included little new information.

But in one critical change, Justice Department officials said the guidelines would have the effect of placing a two-year moratorium on new Federal programs that set aside a certain percentage of contracts for a specified group. In the past, officials have said it would be at least three years before any new programs could be implemented.

The moratorium, however, drew criticism from some groups concerned that the Administration was needlessly retreating from affirmative action. "It's a bone that they're throwing to conservatives," said Laura Murphy, director of the Washington office of the American Civil Liberties Union. "This is a bone to Bubba to try to prove that he's not as liberal as his reputation would have you believe."

The most significant aspect of the new guidelines would be the requirement that Federal agencies conduct an industry-by-industry study of the availability of minority-owned companies in a given market and whether the number of those companies had been held down by past discrimination.

Once the benchmark number of minority-owned companies was determined, Federal agencies might use efforts like granting those companies a 10 percent bonus preference in bidding or giving a bonus in evaluating the bids of prime contractors that promised to use minority-owned subcontractors.

In announcing the proposals, John R. Schmidt, an Associate Attorney General, emphasized that the benchmarks were not a quota "because there is absolutely no guarantee that you will get there."

An overhaul of the Federal set-aside programs was compelled by the 1995 Supreme Court ruling in Adarand v. Pena, which limited the ability of Federal programs to award benefits on the basis of race or sex.

Since then the Clinton Administration has been struggling to figure out how to comply while preserving affirmative action programs that are strongly supported by a crucial political constituency of President Clinton: blacks and other minorities.

"The goal of this proposal is to assure that qualified minority business get a chance to participate in Government contracting," said Deval Patrick, Assistant Attorney General for civil rights, "and that we accomplish that in ways that are consistent with Adarand."

The Adarand decision involved a Department of Transportation program that required states to set a goal of awarding companies owned by minorities and women at least 10 percent of the value of Federal Highway Administration contracts. But the announcement today did not involved the highway construction program. Justice Department officials said a new set of guidelines that will cover the program are still being worked on.

AFFIRMATIVE ACTION: The Clinton administration issued new rules Wednesday on race-based government contracting. Under the plan outlined by Justice Department, "race-conscious procurements" would be allowed only after evidence of discrimination has been found. The rules would disallow set-aside provisions that designate specific numbers of minority contracts in a program.

THE WALL STREET JOURNAL THURSDAY, MAY 23, 1996

Affirmative Action for U.S. Contracts Limited in Rules Using 'Benchmarks'

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL

The Clinton administration formally released guidelines that could limit federal affirmative action in procurement.

The guidelines, issued by the Justice Department yesterday, envision rough "benchmarks" of how much affirmative action the government should be taking on an industry-by-industry basis, but they don't supply the actual benchmarks the administration intends to use.

It remains unclear how the new approach will affect minority-owned government contractors or white-owned firms. The benchmarks are an estimate of the percentage of a given area of federal contracting that minority-owned firms would control if there were no discrimination. If the actual share reached the benchmark, affirmative action would be curtailed or stopped for that industry.

The numbers would be generated using Census Bureau data and other information, and there would be an overall government limit in a given industry. The General Services Administration and the Commerce Department would be largely responsible for calculating the numbers, and the Small Business Administration would help implement it.

Affirmative action has sparked sharp political debate and will be a point of contention in the presidential campaign. The guidelines are one example of President Clinton's policy of "mending" affirmative action rather than ending it. The administration has been under pressure to move on the issue not just from presumptive Republican nominee Sen. Robert Dole, but also from the Supreme Court. The procurement guidelines are an attempt to bring federal practices into line with a 1995 Supreme Court ruling that imposed a tough new constitutional standard on federal policies that use racial classifications.

The federal government uses a variety of means to steer business to small, minority-owned firms. These include setting aside contracts for individual minority-owned companies and a number of ways of weighting the bidding process so that minority-owned companies get an edge when they compete against typically larger white-owned firms.

More than $12 billion in federal procurement is affected; it's a hugely important source of business to minority-owned companies, but a relatively small piece of overall federal spending.

The guidelines say that before setting aside contracts, federal agencies will have to consider "race-neutral" steps such as technical assistance to increase minority opportunity. Another part of the guidelines is designed to make it easier for firms owned by "disadvantaged" women and white men to get special breaks in seeking federal contracts. The administration says in the guidelines that it will wait at least two years before expanding existing set-asides.

On its own initiative, the administration last fall killed a $1 billion set-aside program at the Pentagon.

In a related development, the Justice Department said that a federal judge in Washington had refused, at least for now, to block the setting aside of a contract to build a flight simulator for the Navy. A white-owned company had sued to stop the set-aside, claiming that the Supreme Court ruling last year should be interpreted to prohibit it. The Clinton administration is defending existing affirmative-action programs in at least a half dozen such court cases around the country.

THE WASHINGTON POST

THURSDAY, MAY 23, 1996

Affirmative Action Rules Are Revised

White House to Back Some Race Preferences

By Ann Devroy
Washington Post Staff Writer

Struggling to preserve some elements of affirmative action in the face of skeptical federal courts, the Clinton administration yesterday issued new rules on race-based government contracting and prepared to support an appeal to the Supreme Court to allow universities to continue to consider race in admitting students.

Both steps are billed by the White House as elements of President Clinton's pledge to "mend" rather than end affirmative action, the remedy provided minorities and women by federal and state governments and other institutions to redress past discrimination.

Affirmative action remains a highly charged political issue, and one on which Clinton disagrees with Senate Majority Leader Robert J. Dole (R-Kan.), the presumptive Republican nominee. Dole introduced legislation last year to end all federal racial and gender preferences, although he has had a history of supporting them. Critics of affirmative action say that while Clinton says he opposes quotas, he is trying to preserve parts of the program that amount to quotas.

A Texas university admissions case is the forum for the latest administration move. A federal appeals court in March struck down an admissions program at the University of Texas law school and declared that diversity was not an important enough goal to justify making race a factor in admissions.

The Justice Department on Friday is scheduled to file a brief supporting efforts by the state of Texas and civil rights activists nationwide to overturn that ruling, the first of its kind by a federal court, at the Supreme Court.

The Clinton administration will argue, officials said, that racial diversi-

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Administration Revises Affirmative Action Guidelines for Contracting

AFFIRMATIVE ACTION, From A1

ty in an educational setting serves a compelling national interest and as such is allowable.

White students who sued maintained that the Constitution prohibits discrimination on the basis of race and that the goal of diversity is not a compelling enough standard to sanction discrimination.

The Texas program evaluated minorities and whites seeking admission on two different tracks, with minorities subject to lower standards for tests and academic records. That process has since been altered to use race as only one of several personal factors to be considered.

Critics of Clinton's affirmative action policies argue that the Justice Department entering the case—since it is not compelled to take a position—is evidence on its face that what Clinton is doing is not trying to steer a middle course of "fixing" affirmative action but fighting at every opportunity to preserve as much of it as he can.

Terry Eastland, a former Reagan Justice Department official who has just published a new book on affirmative action, said yesterday that the proposition that Clinton is trying to "steer a middle course is absolutely untrue. It has never been true."

He said that after adverse court rulings and a growing public resentment of affirmative action, the White House has tried to "defend the status quo" in a way that would appease liberals while not alienating the majority of Americans who equate such programs with quotas.

The new procurement rules announced by the Justice Department yesterday, which will be published in the Federal Register today for comment and review, would impose some new limits on race-based contracting and require proof of discrimination before such contracts can be awarded.

The rules would disallow all strict set-aside provisions that designate specific numbers of minority contracts in a program. Programs now common in government that give explicit preferences in contract bidding for reasons such as minority ownership would operate under a new set of limits.

Under those limits, "race-conscious" procurement would be allowed only after a "disparity study" finds credible evidence of discrimination.

The government would also establish for the first time a certification process to ensure companies seeking government business as minority-owned are owned by minorities. Currently companies self-certify.

The Clinton administration had, in effect, no choice but to revise procurement and government employment affirmative action rules after a far-reaching Supreme Court ruling last year, *Adarand v. Peña.* The court said affirmative action programs must meet a standard of "strict scrutiny" that requires contracts awarded on the basis of race to serve a "compelling government interest" and be narrowly constructed to redress identifiable past discrimination.

The federal government awarded more than $11 billion in contracts to minority firms in the last fiscal year, although some of that was on straight competitive bidding.

Conservative legal scholars have argued this spring that when state affirmative action programs ran into legal troubles, many turned to diversity studies that produced "statistics on demand" to prove discrimination and now the Clinton administration, searching for a way out of abandoning affirmative action, is relying on the same device.

The Washington Times ★ THURSDAY, MAY 23, 1996

White House details plan to end minority set-asides

'Constraints' put on U.S. contracts

By Jerry Seper
THE WASHINGTON TIMES

The Clinton administration took a major step yesterday toward formalizing its "mend it but don't end it" approach to affirmative-action programs, announcing strict new limits that would end preferential treatment for blacks and other minorities vying for government contracts.

The limits, outlined by Associate Attorney General John Schmidt during a Justice Department news conference, follow President Clinton's pledge last year to bring federal guidelines into line with a landmark Supreme Court decision barring race-based federal contract awards except in cases where they are "narrowly tailored" to address past discrimination.

"This proposal constrains and will change the whole range of federal affirmative action in procurement," Mr. Schmidt said, noting that while the plan does not eliminate any single government program for minority contracting, it establishes "significant new constraints."

Under the proposal, government agencies would be required to use race-neutral alternatives as much as possible and would disallow for at least two years all programs that set contracts aside for bidding exclusively by minorities, Mr. Schmidt said. It also would tighten eligibility standards for minority firms and make it easier for non-minorities and women to take part.

Mr. Clinton has defended affirmative action as a way to remedy past discrimination in the award of government contracts, but he has questioned the effectiveness of set-asides for some contracts for minority companies. He called last year for a White House review and established a moratorium in October on any new federal programs that reserved contracts exclusively for companies owned by minorities and women.

"This proposal . . . will change the whole range of federal affirmative action in procurement."
— John Schmidt

The new limits appear to take the middle ground between a move by Republicans to kill all affirmative-action programs and efforts by liberal Democrats to expand them. Mr. Clinton's presumed Republican opponent in the 1996 presidential race, Senate Majority Leader Bob Dole of Kansas, has said he would ban affirmative-action programs.

In June 1995, the Supreme Court ruled in a 5-4 decision that the federal government had to adhere to the same strict constitutional standards that states had to obey when implementing affirmative set-aside programs to benefit minorities and other groups that had suffered past discrimination.

The decision, in a "reverse discrimination" case involving a lawsuit brought by a white Colorado contractor, reversed prior Supreme Court rulings that gave the federal government broader discretion than the states in the award of the contracts. The decision was viewed as added momentum to a growing movement to strike down set-aside programs.

Mr. Schmidt, who heads the administration's affirmative-action review that produced the rules, said minority contracts currently account for about 6 percent of the government's total purchases. He said he did not expect the number would drop significantly. The administration, after a 60-day comment period, is expected to adopt final rules by the end of the year.

Assistant Attorney General Deval Patrick, who heads the Justice Department's civil rights division, said he expects the proposed limits to be challenged in court, but he believes they are "defensible."

Mr. Clinton has come under fire over affirmative-action programs from within his own party.

Centrist Democrats, led by Sen. Joseph I. Lieberman of Connecticut, chairman of the Democratic Leadership Council, have called for moderation, saying programs that give preferences to specific groups of Americans must end. Jesse Jackson, however, has told the president that no retreat is possible, telling Mr. Clinton the programs must continue if minorities and women are to have equal opportunities in American society.

Republicans, meanwhile, appear unified in their belief that affirmative-action programs need to be repealed.

In the Supreme Court case, Randy Pech, who owned Adarand Constructors Inc., charged in a suit that his low bid to install guard rails on a stretch of federal highway had been rejected in favor of a higher bid by a Hispanic-owned company. Two lower courts rejected Mr. Pech's claim of discrimination, basing their decision on prior Supreme Court rulings.

In a majority opinion last year, Justice Sandra Day O'Connor rejected the government's attempts to secure minority rights through race-based policies that presumed minorities were always disadvantaged.

"Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection," she wrote.

Administration Proposes Limits on Affirmative Action in Contracting

By MICHAEL J. SNIFFEN
Associated Press Writer

WASHINGTON (AP) - The Clinton administration proposed new rules Wednesday designed to limit and then gradually end preferences for minorities and women in government contracting.

"This proposal constrains and will change the whole range of federal affirmative action in procurement" to comply with a June 1995 Supreme Court decision, Associate Attorney General John Schmidt told a news conference.

The public will have 60 days in which to comment on the proposed rules, to be published in Thursday's Federal Register. They contain no major changes from plans outlined by administration officials in March.

After any changes based on public comments, final rules could be published and implemented by the end of this year, said Schmidt, who heads the administration's affirmative action review that produced the rules.

The proposals would extend President Clinton's suspension last Oct. 23 of programs that set aside a specific percentage of contracts for businesses owned by minorities and women. Set-aside programs could not be resumed unless a review of the new rules after two years of operation showed they had drastically failed to end discrimination. These programs include the largest affirmative action program in the government, the Pentagon's $1-billion-a-year set-aside program.

The proposed rules also would limit other preferences to markets in which specific, past discrimination can be shown and allow those preferences to continue only until that bias is remedied.

The administration clearly wants to accommodate a political climate that has grown more hostile to affirmative action. Republicans in Congress have begun drafting legislation to eliminate affirmative action.

Assistant Attorney General Deval L. Patrick, head of the civil rights division, predicted the new plan might be challenged in court because "some industry groups are organized to litigate these questions."

"If the court meant what it said, we should be fine," Patrick added. "There is no pleasing some of the critics ... (who) are interested in walking completely away from any efforts to make opportunities available to qualified minority contractors. That is not what the court required."

The proposed rules would install new safeguards against the use of front companies by people not eligible for the preferences.

They would expand efforts to recruit more contract bids from minority- and female-owned firms through advertising, mailings and technical assistance directed to them.

They also would make it much easier for non-minority businesses to qualify for preferences by showing they, too, have been socially or economically disadvantaged.

Using census data on the number of disadvantaged businesses in each industry, the government would calculate a benchmark share of government business these firms would get in each industry absent past discrimination.

As disadvantaged businesses approached these benchmarks, preferences for them would be reduced. The level of contracts for disadvantaged businesses would be checked each year; once the

Age Discrimination

JURY RETURNS $4.2 MILLION VERDICT FOR FIRED INSURANCE CLAIMS ADJUSTER

A federal court jury in Missouri has awarded $4.2 million to a former insurance claims adjuster, finding that Farmers Insurance Exchange violated federal and state law when it fired him at age 57 (*Denesha v. Farmers Insurance Exchange*, DC WMo, No. 95-0122-CV-W-BD, 6/20/96).

After an eight-day trial, a jury in the U.S. District Court for the Western District of Missouri on June 20 found that age was a determining factor in the decisions to deny plaintiff Ted Denesha a pay increase and later to discharge him.

The jury awarded $102,614 in back pay, and Magistrate Judge Sarah W. Hays awarded an equal amount in liquidated damages under the Age Discrimination in Employment Act, based on the jury's finding that the violation was willful.

After further proceedings to address the issue of punitive damages under the Missouri Human Rights Act, the jury awarded an additional $4 million. The punitive damages amount may be the largest ever awarded under the MHRA, according to plaintiff's attorney Dennis E. Egan of Kansas City, Mo.

The jury cleared Farmers of an additional claim that it retaliated against Denesha for filing discrimination charges with the Equal Employment Opportunity Commission.

In post-trial motions, Denesha will seek front pay, attorneys' fees, and costs from the court, Egan said.

Hostility To Older Reps Alleged

Denesha worked for more than 18 years as a claims adjuster for Farmers, a subsidiary of Farmers Insurance Group, according to his amended complaint. Over the years, he always received annual raises and at least satisfactory performance appraisals. In February 1992, his supervisor of three years, Julie Clark, rated him "low very good" and recommended a 4 percent salary increase.

In October 1992, the company closed the Independence, Mo., office where Denesha worked and assigned him to work in the field. He used his home as his office and began reporting to Joe Wilfong, a supervisor in the Kansas City, Mo., office who had never worked with Denesha before.

Wilfong allegedly told Denesha that "younger claims reps are running circles around you older claims reps," that he was under a new regime, and that things would be different. During a December 1992 review meeting, Wilfong allegedly said, "The younger reps are making you older reps look foolish" and told Denesha that he would not receive a raise for 1993.

After writing a memo to Clark, Denesha learned that her signature on the salary review form had been forged, allegedly by Wilfong. Denesha claimed that he and one other older employee were the only workers denied raises.

Denesha met with the human resources manager in January 1993 to question why he was denied a raise and was assigned more cases than other employees, but he was referred back to Wilfong. Denesha filed the first of his EEOC charges a few days later.

In June 1993, Denesha was placed on formal warning, then demoted to an entry-level position in the office, and denied use of a company car. Wilfong wrote a memo justifying the action as a way to help Denesha, who was supposedly suffering from "burnout."

Denesha claimed that he was subjected to oppressive supervision and hypercriticism and given unattainable goals, until he was fired in May 1994 for "performance deficiencies." His second and third EEOC charges alleged retaliation.

Martin M. Meyers of Kansas City, Mo., was the lead attorney representing Denesha.

Leonard Singer of Bioff Singer and Finucane in Kansas City, Mo., represented the insurance company. He was not available for comment June 28.

ASSOCIATED PRESS

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Walking Affirmative Action's Thin Line: Diversify But Don't Discriminate

By HELEN O'NEILL
Associated Press Writer

Caleb Kemere, a 19-year-old University of Maryland engineering student, is bright, hard-working and black - all reasons he was awarded one of 34 Benjamin Banneker scholarships to the University of Maryland in 1994.

A year later, a court ruled the program was racially discriminatory, and the university reluctantly ended it.

"It just seems crazy to me that people would complain about a handful of scholarships going to blacks when as recently as the '50s and '60s and '70s, racism was widespread and colleges were being told to desegregate," Kemere said. "It seems the better thing to say is, 'Wow, this is the least we can do to make up for centuries of injustice."'

Once praised as a means of righting past racial wrongs, affirmation-action scholarships and admissions are under attack around the country as reverse discrimination.

Over 18 months, a string of court rulings and legal memos has urged colleges to eliminate programs that for years had helped diversify campuses.

Consequently, colleges are scrambling to revise their race-based offerings, worried about public opinion - and about getting sued.

They are also looking to the U.S. Supreme Court to provide definitive guidance on whether they may legally consider race in admitting students and offering them financial aid.

The Supreme Court has been asked to overturn a lower court ruling that held that the University of Texas Law School discriminated against four white applicants denied admission in 1992.

Their suit forced the law school to stop separating applicants into non-minority and minority pools, the latter of which was allowed slightly lower test scores. The school had wanted to ensure each entering class was 5 percent black and 10 percent Mexican-American.

"We can't do anything to correct what happened to someone's great-grandfather a half a century ago," argued Steven Wayne Smith, who represented the white applicants. "Admissions should be based on merit, not on color or race."

If the high court decides to hear the case, arguments will be held this fall, with a ruling announced sometime in 1997.

Until then, colleges feel caught in the middle, wrestling to redress past discriminatory practices - sometimes under court order - while avoiding charges of reverse discrimination.

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"University admission is the one area where affirmative action has demonstrated significant progress for this country," said Robert M. Berdahl, president of the University of Texas at Austin.

Berdahl said it is absurd to eliminate racial preferences when others can legally remain.

"We are still allowed to give preference to the grandchildren of alumni, but we cannot give preference to the grandchildren of people who were excluded by law," he said.

At the University of Maryland - which in the 1930s denied admission to a young Thurgood Marshall, later the first black Supreme Court justice - spokesman Roland King called the end to the blacks-only scholarship program "devastating." The scholarship, established 17 years ago, is named for Benjamin Banneker, a black

(MORE)

19th century scientist.

The end came when a Hispanic student sued for being denied one of the scholarships. He was awarded $32,863 - the cost of four years at the university.

"The Banneker scholarship ... said to African-Americans, 'This place that might have been closed to your grandparents or parents is open to you and wants you,"' King said. "I think we lost the single most important tool in diversifying the campus."

For all the debate, the number of students and the amount of money involved in race-targeted programs is relatively small.

According to a 1994 study by the General Accounting Office, scholarships awarded on the basis of race or ethnicity represent 3 percent of all undergraduate and graduate scholarships.

And minorities account for about 18 percent of all college students, according to a study by the American Council on Education, an association of colleges and universities.

Last year, the University of California's Board of Regents voted to dismantle all affirmative action admissions policies after Gov. Pete Wilson urged an end to the "racial spoils system."

In Colorado, the attorney general advised state universities and colleges to end race-based scholarships, citing court cases that suggested they are illegal.

To David Rogers, one of the Texas plaintiffs, the issue is simple: He shouldn't have to pay for others' sins.

"The Voting Rights Act was passed when I was 3 months old," Rogers said. "I am not responsible for these things that happened in the past, but I am being made the scapegoat."

Pending a Supreme Court ruling, some colleges say they will continue to take race into account, along with factors such as need. They point to the landmark 1978 Supreme Court ruling in the case of Allan Bakke, a white man denied admission to the medical school at the University of California at Davis. The court banned quotas but allowed consideration of race or national origin.

William Gray, president of the United Negro College Fund and a former Democratic congressman, views the debate in stark political terms.

"I call it the 'Willie Horton goes to college' election-year issue," Gray scoffed, rattling off a list of other preferential factors used to award scholarships, such as sex, religion and athletic prowess.

"We are talking about one little bush as if it is a great overgrowth choking the forest," Gray said, "when the fact is the forest is overloaded with preference scholarships - but they are all for whites."

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CONTACT: Donita F. Montgomery
Senior Trial Attorney
(317) 226-7809

EEOC AND HARMON CONSTRUCTION INCORPORATED SETTLE LAWSUIT

INDIANAPOLIS, INDIANA -- The United States Equal Employment Opportunity Commission ("EEOC") and Harmon Construction Incorporated have agreed to settle a lawsuit filed under Title VII of the Civil Rights Act of 1964 alleging retaliation.

In its Complaint, the EEOC alleged that Harmon Construction Incorporated retaliated against two employees by refusing to consider them for employment because of discrimination charges they had previously filed against the company. In an agreement resolving the case, Harmon Construction agreed to pay damages totalling $14,000. Additionally, the company agreed to provide training to its managers and supervisors regarding the requirements of Title VII of the Civil Rights Act of 1964 and to cease its blacklisting of the two employees.

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex or national origin; the Age Discrimination in Employment Act; the Equal Pay Act; prohibitions against discrimination affecting individuals with disabilities in the federal sector; sections of the Civil Rights Act of 1991, and Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments.

* * *